SUBMITTED

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. 790

S. M. GORIEB, PETITIONER,

vs.

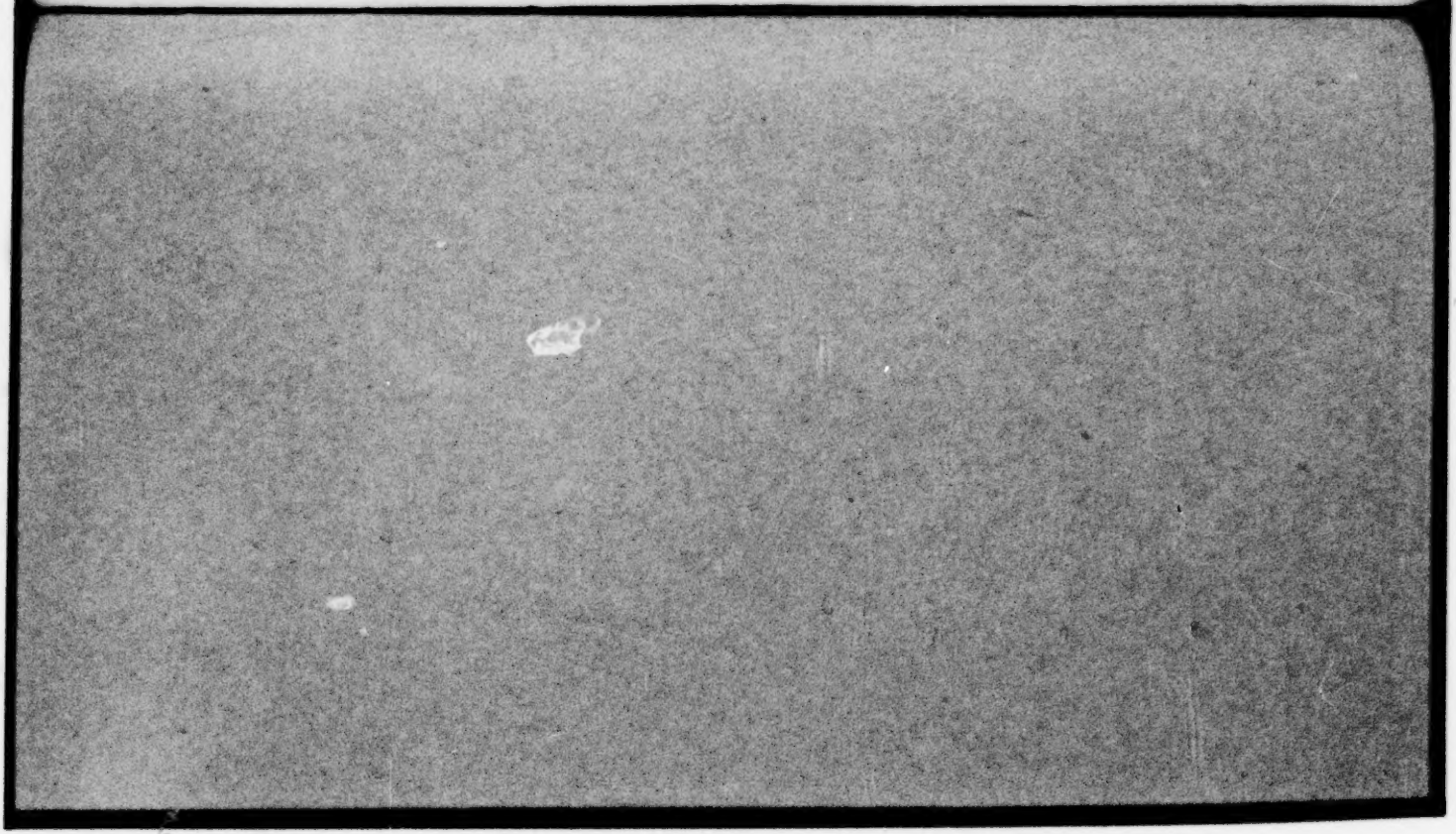
CHARLES D. FOX ET AL., MEMBERS OF THE CITY COUNCIL OF ROANOKE, VIRGINIA, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

PETITION FOR CERTIORARI FILED NOVEMBER 14, 1956

CERTIORARI GRANTED FEBRUARY 11, 1957

(22,906)



(32,366)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 799

S. M. GORIEB, PETITIONER,

vs.

CHARLES D. FOX ET AL., MEMBERS OF THE CITY COUNCIL OF ROANOKE, VIRGINIA, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

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[fol. 1]

IN SUPREME COURT OF APPEALS OF VIRGINIA, JUNE TERM, 1926

S. M. Gorieb

vs.

Charles D. Fox et als., Members of City Council of Roanoke, Virginia, et als.

Petition for Writ of Error and Assignments of Error

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, S. M. Gorieb, respectfully represents that he is aggrieved by a judgment of the Circuit Court of the City of Roanoke, Virginia, entered in vacation on the second day of March, nineteen hundred and twenty-five, in a certain action at law wherein your petitioner was the plaintiff and the City of Roanoke, Virginia, Charles D. Fox, W. M. Shickel, B. J. Fishburne, J. B. Comer, Luther G. Stiff, Members of the City Council of Roanoke, Virginia, and Douglas P. Magann, Building Inspector of the City of Roanoke, Virginia, were defendants.

A transcript of the record of the proceedings in said Court is herewith presented.

[fol. 2] Statement

Your Petitioner is the record owner in fee simple of several building lots in the City of Roanoke, Virginia, said lots located about the center of said city, on the northeast corner of Patterson Avenue and Eleventh Street, fronting one hundred and thirty-nine (139) feet on Patterson Avenue and extending back parallel with Eleventh Street one hundred and fifty (150) feet to an alley and upon the eastern portion of said lots there is located a dwelling house belonging to your petitioner, which has been used for a dwelling house for a number of years. The western portion of said property immediately adjacent to Eleventh street has never been improved and there is no building of any description thereon.

Prior to the 12th day of June, 1924, your Petitioner applied to Douglas Magann, Building Inspector for the City of Roanoke, Virginia, for a permit to erect a store building on the above described premises. The Building Inspector refused said permit and referred your Petitioner to the City Council and on the 12th day of June, 1924, your Petitioner filed his petition with the City Clerk asking that the City Council grant him a permit to erect a brick store building upon said property, complying with all building rules and regulations, said building to be adjacent to and front forty (40) feet on Patterson Avenue and to extend back adjacent to Eleventh Street a distance of seventy five (75) feet. On the 13th day of June, 1924, the City Council referred the question of whether or not the permit should be granted to the City Manager for investigation and report, and on the 20th day of June, 1924, the City Manager made his report to the Town Council and the City Council refused said permit. Whereupon your petitioner asked to be granted a permit to build ten (10) or even twenty (20) feet from the street line and the City Council refused said permit, but passed a resolution that your petitioner be granted a permit to build thirty four and two-thirds ($34\frac{2}{3}$) feet from the street line; thereupon, plaintiff on the 11 day of August, 1924, had served upon the defendants his notice and petition as provided by law for a writ of mandamus to compel the City of Roanoke, Virginia, to issue a building permit for the erection of a store building on the northeast corner of Patterson Avenue and Eleventh Street, adjacent to the street or nearer thereto than thirty four and two-thirds (fol. 3) ($34\frac{2}{3}$) feet. Said petition being under oath as required by law and giving verbatim sections 243, 244 and 245 of the City Ordinance regulating the location of buildings, relative to the street line and filed with said petition, as a part thereof, a copy of the map prepared by the City Manager showing the distances from the street to the houses in the same block. And the plaintiff also filed with said petition as a part thereof, a statement, showing the average line established by the houses fronting on Patterson Avenue, and asked that the City Ordinance be held invalid in that the same authorizes the City Council to grant or withhold a permit to any individual as they choose, thus violating the rule against unjust discrimination. That the

City Ordinances had no application in the case under consideration and was incapable of being construed so as to establish a building or set-back line; that said City Ordinance did not comply with the Acts of the Assembly of 1922, authorizing cities to establish set-back building lines in that the city had not been divided into districts, as provided in said Acts of the Legislature, that said Ordinances, and the Acts of the Legislature authorizing the establishment by cities of set-back building lines, in this case violated the provisions of both the Federal and State Constitutions, and said regulation was unconstitutional.

To this petition of the plaintiff the defendants filed their joint and separate demurrer and answer, not under oath, in which they admitted the refusal of the City Building Inspector and the Council of the City of Roanoke to permit the plaintiff to construct the building nearer to the street than thirty four and two thirds (34⅔) feet from the street line, relying upon the acts of the Assembly of 1922, page 46, as an enabling act upon which the City Ordinances were based. This answer recited the advantage of ordinances generally in establishing set back building lines, admitted that the strict letter of the provisions of the ordinance may in some cases work a hardship and that the Council had the power in such cases to grant or withhold a building permit. The answer further alleges that the City Ordinance under proper construction establishes a set-back building line, is capable of being construed and is not in violation of the State or Federal Constitution, is a reasonable provision [fol. 4] and should be upheld.

Upon the trial of the case the testimony of several witnesses was taken to establish the fact that the corner lot with fifty (50) feet front on Patterson Avenue was worth thirty-five hundred dollars ($3,500.00) or four thousand dollars ($4,000.00) as resident property and eighty-five hundred dollars ($8,500.00) or more for business property and that a building set back thirty-four and two-thirds (34⅔) feet from the street is of little or no value for business purposes. All of which testimony was filed and made a part of the record by a bill of exceptions.

The Court held that the City Ordinance was valid and unobjectionable in all particulars and thereupon entered an order dismissing the plaintiff's petition.

Assignments of Error

It is respectfully submitted that:

(1.) The Court erred in holding that the City Council had the right to establish a set-back building line and in the same ordinance reserve the right not to be guided by the provisions of said ordinance.

(2.) The Court erred in holding the City Ordinance constitutional as it constitutes "a taking" of private property for public use without compensation, therefore, a violation of the provisions of both Federal and State Constitutions.

(3.) The Court erred in holding that the ordinance was applicable under the facts presented in this case and in holding that under any construction of said ordinance the petitioner was prohibited from building nearer the street line than thirty-four and two-thirds (34⅔) feet.

(4.) The Court erred in holding that the ordinance was valid as based upon a Legislative Enabling Act as the City has never been divided into districts as provided for in said Enabling Act.

In Regard to the First Assignment of Error

The provision in the City Ordinance that the houses built in a block must correspond to the existing house line of the houses built in the same block unless special permission is otherwise granted by the City Council is not a discretion to {fol. 5} be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold a permit under the same circumstances as the whims of the City Council may dictate.

Beginning in 1886, with the case of Yick Wo vs. Hopkins, 118 U. S. 356, where an ordinance in San Francisco forbade any person to carry on a laundry within the city without the consent of the Board of Supervisors, except in buildings of brick or stone, was held unconstitutional as a naked and arbitrary power. To the present time there is not even a conflict of authorities on this point.

A later case is the Village of South Orange vs. Heller, 1921, N. J. 113 Atl. 697, when a zoning ordinance passed

under a legislative enabling act reserving to the trustees the discretionary power to give to one and withhold from another the privilege of violating the ordinance, was without legal force.

The right to grant to one person a building permit and withhold the same from another person under like circumstances is not given in the Legislative enabling act and certainly could not be termed as a reasonable restriction under the police power of the City or State, yet the answer filed by the City admits this power to give or withhold a building permit under the terms of the ordinance. (Record, page 18.)

Police regulations, in order to be enforceable, must permit to all under like circumstances the enjoyment of the same rights and privileges.

Missouri v. Lewis, 101 U. S., 22;
Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. Rep. 207;
Barbier v. Connolly, 113 U. S. 30, 5 Sup. Ct. Rep., 357;
Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41-55, 35 Sup. Ct. Rep. 671;
State v. Pennoyer, 5 L. R. A. 711, and cases;
Ann. Cas. 1915B, 957.

[fol. 6] In Reference to the Second Assignment of Error

The Ordinance is what is known as a zoning ordinance for purely esthetic purposes indirectly prohibiting the erection of business buildings in certain sections of the city and deprives the owner of the use of the most valuable part of his lot without any compensation therefor.

The Petitioner's property is situated in about the center of the city in a block where there are no business houses, although there are stores above and below on the same street and all around the block. The property is worth about twice as much for business purposes as for residential purposes, but is of little or no value for business purposes with a business building back thirty four and two thirds (34 2-3) feet from the street. This also deprives the petitioner of the rear portion of his premises for building purposes as the lot is not of sufficient depth to allow a store or business building to be built back thirty four

and two-thirds (34 2-3) feet from the street and another building in the rear thereof.

This taking of private property for public use without some provision for compensation is prohibited by the State and Federal Constitution and there is no authority therefor except in cases of public nuisance, or as a war measure. There are what is known as the Bill Board Cases, The Turn Table Cases and the Slaughter House Cases which rest upon a different ground, however, ordinances restricting business buildings from residence districts are universally held invalid.

The most recent cases are annotated in 19 A. L. R., page 1395.

In the case of Jno. R. Spann vs. City of Dallas, Texas, Supreme Court November 2, 1921, reported 19 A. L. R., page 1387. It was held that a law which assumes to be a police regulation, but deprives the citizen of the use of his property under the pretense of preserving the public health, safety, comfort or welfare, when it is manifest that such is not the real object and purpose of the regulation, will be set aside as a clear and direct invasion of the right of property without any compensation. The same prin-
[fol. 7] ciple is set out in 6 L. R. C., 236 et seq.

Legislative declaration cannot make an ordinary retail store in a residence district a nuisance.

20 R. C. L. 386, 442.

Ruling Case Law gives a concise statement of the principle of law as to whether or not the ordinance is constitutional.

4 R. C. L., page 397:

"Statutes and ordinances have been enacted for the establishment of building lines between which and the street line the owner of property is forbidden to build, and providing for proceedings to procure the demolition of parts of buildings extending beyond the established line upon the payment of compensation to the owner thereof; but a law purporting to establish building lines on less than the entire lot is unconstitutional if it makes no provision for any proceeding in a court of law for condemning property, nor provides for notice to the owner or for compensation of those whose property is taken for public use."

Citing the following cases exactly in point with this case:

St. Louis vs. Hill, 21 L. R. A., page 226, where the city attempted to restrict the building of houses nearer than forty (40) feet of the street line, said ordinance was held unconstitutional and the Court went so far as to approve the decision in the case of Philadelphia vs. Leonard, 97 Pa. 242, where under like circumstances a property holder recovered a judgment against the city for depriving him of the use of his property without compensation.

In West Virginia, the case of Val Fruth, et als., vs. Board of Affairs, decided 1915, Reported 84 S. E. 105, and in L. R. A. 1915 C, page 981. Under a Legislative enabling act, the City of Charleston sought to regulate a building line and the same was held unconstitutional in that there was no compensation to the owner in depriving him of the use of his property.

In the case of Eubank vs. the City of Richmond, 42 L. R. A. (U. S.) 1123, there was no question in the record of a loss of value to the property owner as no business property was involved, however, the ordinance was held uncon-
[fol. 8] stitutional.

The authorities on the question are numerous and there is no conflict in the United States upon the exact facts presented in this case. The City Council cannot regulate the building of business houses in residential districts.

Levy et als. vs. Mrovlog, Supreme Court N. J. 1921, 115 Atl. 359. (Footnote 42 L. R. A. (N. S.) 1125.)

State of Ill. vs. City of Chicago, 49 L. R. A. (N. S.) 441 (see annotation).

Chas. H. Buchanan vs. William Worley, U. S. Supreme Court, 1917, 38 U. S. Supreme Court Reports 16 (see annotation).

One of the most reasonable restrictions was held unconstitutional in the case of Robert Wilson vs. Dennnie P. Cooke, Colorado, 1913. 44 L. R. A. (N. S.), page 1031.

The test of the validity of a statute is not what has been done, but what may be done under its provisions.

Richmond vs. Model Steam Laundry, 111 Va. 758.

In determining whether a Legislative enactment of this character is or is not reasonable the courts will look to the

purpose of the statute and determine from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.

Lockner v. New York, 198 U. S. 45, 64; 3 Ann. Cas., page 1133;

St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 35 Sup. Ct. Rep. 99;

Coppage v. Kansas, 236 U. S. 1, L. R. A., 1915 A, page 960.

In Regard to the Third Assignment of Error

The Court erred in construing the ordinance to restrict the petitioner from building nearer to the street line than thirty four and two-thirds (34 2-3) feet. This construction could not be gathered from the four corners of the ordinance. The ordinance was drawn to meet a condition where there was in a block an established building line, said line [fol. 9] to be established by sixty per cent of the houses in the block, on both sides of the street, while in the block under consideration there is no uniformity in the buildings. There are thirteen houses in the block and no uniform line established by any three of them. Therefore, to get a line established by sixty per cent of the houses there must be taken, either seven of the nearest houses to the street or seven of the furtherest houses from the street. The City Council, evidently, not knowing how to establish a line by taking sixty per cent of the houses in the block as there was no uniformity in the seven houses, took the general average as an established line and let it go at that. Said ordinance was not enacted to have any application where there was no uniformity in the building line of the houses, is incapable of any reasonable construction and is, therefore, invalid. Certainly it cannot be said that the City Council has the right to disregard entirely the sixty per cent provision for establishing a line and take the general average line as was done in this case.

As to the Fourth Assignment of Error

The Court erred in holding the City Ordinance valid as an ordinance based on a legislative enabling act as the city has not met the requirements of the Legislative act by dividing the city into districts.

For the foregoing reasons your petitioner is advised that the final order of the Circuit Court of the City of Roanoke, entered on the 2nd day of March, 1925, dismissing the plaintiff's petition with costs to the defendant, should be reviewed, annulled, and set aside by this Court, and the petitioner should be granted the relief prayed for in his original petition.

Wherefore, he prays that a Writ of Error may be accordingly awarded him.

Respectfully, S. M. Gorich, by Counsel. W. V. Birchfield, Jr., Attorney for the Petitioner.

I, B. F. Buchanan, an attorney practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion it is proper that the order entered in this suit by the Circuit Court of the City of Roanoke, Virginia, on the 2nd day of March, 1925, referred to in the above petition, should [fol. 10] be reviewed by the Supreme Court of Appeals of Virginia.

B. F. Buchanan.

Recd. May 14, 1925. M. P. B.

Writ of error granted. Bond $300. M. P. Burks.

[fol. 11] [Caption omitted]

In Circuit Court of City of Roanoke

S. M. Gorich

vs.

Charles D. Fox, W. M. Stuckel, B. J. Fishburn, J. W. Comer, Luther G. Stiff, Members of the City Council of Roanoke City, Virginia; B. J. Fishburn, Mayor City of Roanoke, Virginia; Douglas P. Magann, City Building Inspector

Notice for Writ of Mandamus—August 11, 1924

Take notice that on Monday, August 18, 1924, at 9 o'clock a. m., or as soon thereafter as the same may be heard, the

undersigned will apply to the judge of the Circuit Court of [fol. 12] Roanoke City, Virginia, for a writ of mandamus, to compel you to grant unto him a building permit to erect a brick store building on the northeast corner of Patterson and 11th Street, in the City of Roanoke, Virginia. Said building to be located on property owned by the undersigned, fronting on Patterson Avenue forty (40) feet, and running back seventy-five (75) feet on 11th Street to be erected wholly on the property of the undersigned and to be built up to the edge immediately adjacent to the street lines of Patterson Avenue and 11th Street.

Given under my hand this 11th day of August, 1924.

S. M. Gerieb, by Counsel. W. V. Birchfield, Jr., p. q.

In Circuit Court of City of Roanoke

Petition for Writ of Mandamus

To the Honorable Herbert B. Gregory, Judge of said Court:

Your petitioner, S. M. Gorieb, would respectfully represent unto Your Honor the following facts:

1. That he is a citizen of the United States and the State of Virginia, the owner in fee simple of the parcel or tract of land in the City of Roanoke, Virginia, lying on the north side of Patterson Avenue, beginning at the northeast corner of Patterson Avenue and 11th street and extending east fronting one hundred and thirty nine (139) feet on Patterson Avenue and extending back parallel with 11th Street one hundred and fifty (150) feet to an alley, having acquired the same by the following conveyances.

By deed dated April 27, 1923, recorded in the Clerk's Office of your Honor's Court in deed book 387, page 466, H. A. Fisher, single, in consideration of the sum of $7,000.00, conveyed unto your petitioner the following parcel or tract of land:

Beginning at the northeast corner of Patterson Avenue and Eleventh Street, formerly "B" Street; thence with Patterson Avenue S. 79° E. 64 feet to a point; thence N. 10° 30' E. 150 feet to an alley; thence with said alley N. 79°

W. 64 feet to Eleventh Street; thence with 11th Street S. 10° 30' W. 150 feet to the beginning, and being lot No. 8 and part of lot No. 7, section 25, according to the F. Rorer [fol. 13] Map.

And, by deed dated October 27th, 1923, and recorded in the Clerks — of Your Honor's Court in Deed Book 413, page 18, Mary L. Stevens and W. H. Stevens, her husband, in consideration of the sum of $10,000.00 conveyed unto your Petitioner the following parcel or tract of land.

Beginning at a point on the north side of Patterson Avenue 275 feet west of 10th Street formerly "A" Street; thence N. 10 degs. 30 min. East 150 feet to an alley; thence with said alley N. 79 degs. W. 75 feet to a point; thence S. 10 degs. 30 min. W. 150 feet to Patterson Avenue; thence with Patterson Avenue S. 79 degs. East 75 feet to the beginning, and being part of Lot No. 6, and all of lot No. 7, Section No. 25, according to the F. Rorer Map.

2. That section 243 of the City Ordinance regulating the location of buildings, relative to the street line is as follows:

"That all buildings hereafter to be erected in the City of Roanoke must be built to correspond to the existing house line of the houses built in the same block unless — special permission, otherwise granted by the City Council; provided, that if the buildings to be erected shall be located upon a switching track of any commercial railroad it shall be permitted to build closer to the street than the line of the existing houses.

That section 244 of the City Ordinances regulating the location of building, relative to the street line is as follows:

"Section 244. That the line of the existing houses shall be the line upon which sixty per cent of the houses in the block in which the proposed building is intended to be erected, have with relation to the street, and the said proposed buildings must be at least as far from the street as the line established by said sixty per cent of the houses. The word "block" herein used does not refer to any entire city square, but shall be construed to be that portion on both sides of the street upon which the new buildings is proposed, bounded by the nearest intersection streets to the right and left of said proposed building."

That section 245 of the City Ordinances regulating the location of buildings, relative to the street line, is as fol- [fol. 14] lows:

"Section 245. That if there be not more than four houses in the block upon which said building is proposed to be erected, that the building line of said new structure may be such as shall be fixed upon by the owner of said building; provided, however, that in no event shall the front of the proposed building be nearer than twenty feet from the front line of his said lot, exclusive of the side walk, in case his said grant shall carry him to the street line, provided, however, that counsel within their discretion may grant or refuse a permit to erect buildings closer to the street than hereinbefore provided, in any block wherein there now exists buildings used for business or mercantile purposes, accordingly as their judgment will dicate whether the proposed buildings will subserve the general welfare of the neighborhood and city, and provided, further, that they shall grant a permit whenever in their judgment the block to contain the proposed building has a greater value for business or mercantile than for residential purposes."

That Douglas P. Magann, Building Inspector for the City of Roanoke, Virginia, when requested by your petitioner to be given a building permit to erect a store building on the above premises, refused said permit and referred your petitioner to the City Council and your petitioner on the 12th day of June, 1924, filed his petition with the City Clerk asking that the City Council grant him a permit to erect upon his property up to the street line on the northeast corner of Patterson Avenue and 11th Street a brick store building, complying with all building rules and regulations, said building to be forty (40) feet front on Patterson Avenue, and extending back seventy five feet along the line of 11th Street.

3. That on Friday, June 13, 1924, the question was discussed by the Town Council and referred to the City Manager for investigation and report.

4. That on Friday, June 20, 1924, the City Manager made his report to the Town Council and Exhibited a map showing the distance of all property from the street line in the

[fol. 15] same block with our petitioner's property. A copy of Street Map is filed herewith, marked "Exhibit A," and made a part hereof, the average distance from the street line of the houses in this block is 34⅔ feet; that the City Council refused to grant a building permit for your Petitioner to erect a building on his premises, closer than 34⅔ feet from the street line of Patterson avenue. That this City Ordinance leaves the whole matter to the discretion of the Town Council, and to avoid the cost and trouble of delaying the erection of this building, this petitioner at that time offered to erect his building twenty (20) feet from the city line as a compromise, but that offer was refused, and the City Council passed a resolution that this petitioner be granted a building permit to conform with the strict interpretation of the City Ordinances.

5. This petitioner would further show unto Your Honor that he is greatly damaged by the delay in erecting the said building; that he has the same leased to Piggly Wiggly Company for store purposes and that said store is to be conducted in a first class up-to-date manner.

6. Your petitioner is advised that the City does not have the right to enact the ordinances herein above set out in paragraph two of this petition, that said ordinance is invalid and of no effect, that the City Council has no right to restrict your petitioner in the use of his property except under the police power of said city and that your petitioner is not injuring any person in the use of his property for a store building and there is no evil resulting from a building being erected on your petitioner's premises that could be restricted under the police power of the city; the refusal by the City Council to grant unto your petitioner a building permit is depriving him of the use of his property without due process of law. That the refusal of the City of Roanoke to grant a permit to your petitioner to erect a store building up to and immediately adjacent to the street line of Patterson Avenue constitutes a taking of the property belonging to your petitioner for public use without due compensation therefor and is unconstitutional.

7. Your Petitioner is advised that the City Ordinance is invalid, null and void in that the same is incapable of being con-
[fol. 16] strued. Section No. 244 set out in paragraph No. 2

of this petition provides: "That the line of the existing houses shall be the line upon which sixty per cent of the houses in the block in which the proposed building is intended, have with relation to the street, and the said proposed buildings must be at least as far from the street as a line established by said sixty per cent of the houses." There are thirteen houses in the same block as the property owned by the petitioner, one of the said houses also being owned by your petitioner. The average distance from the street line as established by the thirteen houses in said block is 34.67 feet. This distance of 34.67 feet was given the City Council by the City Manager as the sixty per cent average required under the city ordinance. This distance is not the average distance of sixty per cent of the houses in the block from the street line, but the average distance from the street line of all thirteen houses in the block. The average distance of the eight nearest houses from the street line is 28.9 and the average distance of the eight furtherest houses from the street line is 39.35 feet. The act does not state how to derive at the distance from the street line as established by sixty per cent of the houses in the block. Said restriction is too vague, uncertain and conjectural in meaning to be construed, and is for that reason invalid. The City Council refused to grant your petitioner a permit to erect a building on his property in this block closer than 34.67 feet to the street line and the City Council in so doing did not take a line established by sixty per cent of the houses in the block as specified in the ordinance, but took the average line of the thirteen houses. This line of the general average being taken by the Council because the sixty per cent line as specified in the ordinance is incapable of being construed. Your petitioner files herewith the statement of E. B. Jacobs Company, States Certified Public Accountant, showing the calculations of the distances of the houses from the street in this block, marked "Exhibit B" and made a part of this petition.

8. The City Ordinance is unconstitutional in that it allows unjust discriminations by the Council. Section No. 245 of the City Ordinance gives the Council within their discretion the right to grant or refuse a permit to erect buildings closer to the street than thereinbefore provided. This grants the power to the Council to prohibit your

[fol. 17] petitioner from building on his property closer than a specified number of feet from the street line tomorrow or any time the Council may desire, a permit may be granted to property holders in the same block to erect buildings immediately adjacent to the street line.

9. Your petitioner alleges that at the time he purchased the property hereinbefore described, he had no notice of the building restrictions; that the building of a store building by your petitioner, back from the street line will damage materially the value of your petitioner's property for business purposes; that the erection of a building 34.67 feet from the street line renders this property practically valueless for business purposes and this restriction constitutes "a taking" of said property by the public and no compensation is provided therefor.

10. Your petitioner is advised that under the acts of the Legislature of 1922. The City Council in the ordinance providing for building restrictions is required to divide the City into zones. That Roanoke City has never been divided into zones and that the present city ordinance is not founded on the acts of the legislature, not authorized and is therefore void.

11. Wherefore, your petitioner is otherwise without sufficient, adequate and complete relief, therefore prays, that a peremptory writ of mandamus may be issued by this Honorable Court, directed to the said Charles D. Fox, W. M. Shickel, B. J. Fishburn, J. W. Comer, Luther G. Stiff, members of the City Council for the City of Roanoke, Virginia, J. B. Fishburn, Mayor of the City of Roanoke, Virginia, and Douglas P. Magann, City Building Inspector, City of Roanoke, Virginia, compelling them to issue unto your petitioner a building permit to erect a store building on his property, coming up to an immediately adjacent to the street line of Patterson Avenue and 11th Street, and that all such other, further, general and complete relief be granted your petitioner as the nature of his case may require and as in equity seem meet.

S. M. Gorieb, Petitioner.

[fol. 18] *Duly sworn to by S. M. Gorieb, Jurat omitted in printing.*

Exhibit B to Petition

Offices E. B. Jacobs Company, Certified Reports, Roanoke, Va., Winston-Salem, N. C.

Audits, Systems, Tax Service

313-314 First National Bank Building, Roanoke, Virginia

J. A. D. Parrish, Certified Public Accountant (Va.), Attorney at Law, Member American Institute of Accountants, Virginia Society of Public Accountants. R. B. Jordan, Manager, J. B. Phelps, Members Virginia Society of Public Accountants

June 27, 1924.

Mr. W. V. Birchfield, Jr., First National Bank Building, Roanoke, Virginia.

Dear Sir: In accordance with your request, we have computed the average line of the existing houses fronting on Patterson Avenue, S. W., between Tenth and Eleventh Streets, S. W., and the following schedule shows the average line, computed on the basis of all existing houses, sixty per [fol. 19] cent nearest and sixty per cent farthest houses:

No. 1022 Patterson Av	26.1 ft.	26.1 ft.	
No. 1024 Patterson Av	26.5 ft.	26.5 ft.	
No. 1026 Patterson Av	26.5 ft.	26.5 ft.	
No. 1028 Patterson Av	27.0 ft.	27.0 ft.	
No. 1016 Patterson Av	29.8 ft.	29.8 ft.	
No. 1004 Patterson Av	30.8 ft.	30.8 ft.	30.8 ft.
No. 1000 Patterson Av	31.1 ft.	31.1 ft.	31.1 ft.
No. 1030 Patterson Av	33.5 ft.	33.5 ft.	33.5 ft.
No. 1001 Patterson Av	37.5 ft.		37.5 ft.
No. 1005 Patterson Av	44.2 ft.		44.2 ft.
No. 1009 Patterson Av	44.2 ft.		44.2 ft.
No. 1027 Patterson Av	44.5 ft.		44.5 ft.
No. 1025 Patterson Av	49.2 ft.		49.2 ft.
	458.7 ft.	231.5 ft.	314.8 ft.

Average line 13 houses, 34.67 ft.
Average line 8 nearest houses, 28.9 ft.
Average line 9 farthest houses, 29.35 ft.

The figures used for the above computation were taken from the blue print, marked Exhibit A, attached to the Petition for Writ of Mandamus by S. M. Gorich against Charles D. Fox, et al.

Respectfully submitted.

E. B. Jacobs Company, R. B. Jordan, Manager.

34.57

In Circuit Court of City of Roanoke

Demurrer and Answer

The joint and separate demurrer and answer of C. D. Fox, W. M. Shickel, J. M. Comer, B. J. Fishburn, and Luther M. Stiff, Council of the City of Roanoke, and B. J. Fishburn, Mayor of the City of Roanoke, and D. P. Magann, Building Inspector.

For demurrer to said petition defendants say that the averments of the same are not sufficient in law to entitle the [fol. 20] plaintiff to the relief prayed for, or to any relief.

For answer to said petition, or to so much thereof as defendants are advised it is material for them to answer, they, answering, say: That it is true, as stated in the petition, that both the City Inspector, D. P. Magann, and the members of the Council of the City of Roanoke, refused to permit, or otherwise authorize, the plaintiff to construct the building mentioned in said petition on the lot mentioned in the petition, as proposed by the plaintiff, for the reason that the building as proposed to be erected, would, if erected, violate the ordinance of the City of Roanoke, and its various provisions referred to in the petition.

Defendants, further answering said petition, say that the ordinance of the City of Roanoke, which is the subject of attack in plaintiff's petition aforesaid, is grounded on an Act of the Virginia Legislature approved February 17th, 1922, to be found in Acts of the Assembly, 1922, page 46, which reads as follows:

"That for the promotion of the health, safety, morals, comfort, prosperity and general welfare of the general public, the Council, or other governing body of any city may, by ordinance, divide the area of the city into one or more districts, of such shape and area as may be best suited to carry out the purposes of this act, and, in such dist. or districts may establish setback building lines regulating and restricting the location of buildings and other structures, their height, area and bulk; the percentage of lot to be occupied by buildings or other structures; the size

of courts or other open spaces, and the trade, industry, residence, and other specific uses of the premises in such district or districts, provided that nothing in this act contained shall be construed as intended to authorize the impairment of any vested right."

In pursuance of the authority above conferred by the Legislature, the Council of the City of Roanoke, by ordinance, passed on the 14th of September, 1923, provided that it should be lawful in the future for any person to locate or construct on any lot fronting on any street or alley in the city in which one-half of the buildings on both sides of the street are used exclusively for residence purposes, etc., any building for a gasoline filling station, public garage, etc., without the written consent of 80 per cent of the property holders, according to frontage, on said street [fol. 21] or alley.

In pursuance of the authority so conferred, as aforesaid, the Council of the City of Roanoke, on the 20th day of August, 1922, also passed an ordinance regulating the location of buildings relative to the street lines. Section 243 244 and 245 of said ordinance are set forth by plaintiff in his petition as aforesaid.

On the 19th day of January, 1923, the Council of the city of Roanoke passed an ordinance dividing the City of Roanoke into districts for the purpose of regulating the use of land and buildings, and to establish building lines regulating and restricting the construction of buildings and other structures. By said ordinance the city was divided into 2 districts; one of which was to be known as the "Business District," and the other as the "Residence District." A copy of said ordinance is herewith filed, and asked to be read as a part of this answer. These ordinances supplement each other.

Prior to the passage of the ordinances aforesaid, no procedure had been developed by which city-wide regulation could be imposed, and development directed in the City of Roanoke. An owner of property could use it for any purpose and in any way he pleased, provided he did not establish and maintain a common law nuisance. The result, as evidenced by conditions in the City of Roanoke, is chaotic. For want of some sort of well-considered plan of building, each man built with reference to his individual

interest, and in many instances without any reference whatever to his neighbor.

The advantages to be derived from establishing set-back lines, as provided by the ordinance in question, are numerous. As is well known, it is the first essential to securing any measure of orderliness in the building of a city. Front yards afford room for lawns and trees; keep the dwellings farther from the dust, noise and fumes of the street, and add to the attractiveness and comfort of a residence district. They create a better home environment, and providing, as the ordinance in question does, a greater distance between the buildings on opposite sides of the street, tend to reduce the fire hazard. The projection of a building beyond the front line of adjacent dwellings cuts off light and air; moreover, the rapid growth of automobile traffic in recent years has especially focused attention upon the width of thoroughfares, and especially upon the danger connected with hidden corners. The necessity of widening existing highways has brought the City of Roanoke, as well as all other cities in the country, face to face with [fol. 22] the enormous cost of condemning buildings along the lines of such thoroughfares. Here in the City of Roanoke, the city has had to pay out thousands of dollars within the last few years for widening streets, and the probability is that many thousands more will have to be expended for that purpose as the city grows and population increases.

The ordinance in question therefore affords a wise provision for the future as well as for the present.

For the above, and other reasons that might be assigned, defendants say that the ordinance and the provisions of the ordinance in question, tend to promote the health, safety, comfort, prosperity and general welfare of the inhabitants of the City of Roanoke, and that neither said ordinance, nor any of its provisions, deprive the plaintiff of the lawful use of his property in the sense of the law, as alleged in the petition, and that neither said ordinance, nor any provision thereof, is a violation of any constitutional right, either State or Federal, of the plaintiff.

The building proposed to be erected by the plaintiff is in the residence, not the business section, as established by the city ordinance hereinbefore mentioned. The values

along the street are based on the use of the land for dwellings. The houses on both sides of the street and within the block are of a substantial character, and are set back from the street and the establishment of such a house and business as that proposed by the plaintiff on the location proposed, would greatly injure the street for residence purposes, and greatly depreciate the value of the property in the immediate vicinity of the property of plaintiff, on which he proposes to erect his building.

In paragraph No. 7 of the plaintiff's petition he states that the ordinance in question is invalid for the reason that Section 244 provides that "the line of the existing houses shall be the line upon which 60 per cent of the houses in the block in which the proposed building is intended have in relation with the street, and the said proposed building must be at least as far as the line established by said 60 per cent of the houses," but does not provide how the line is to be established where the buildings in the block are not a uniform distance from the street line.

In reply to this contention the defendants say that the language of the ordinance should be construed according to the dictates of common sense and reason, and when this [fol. 23] test is applied, there is no such uncertainty in the language as is attempted to be pointed out by the plaintiff, and certainly it cannot be said that the language is so vague and uncertain that the provision cannot be enforced, and — the ordinance — invalid.

As stated in the petition, there are thirteen houses on both sides of the block; five on the side on which plaintiff proposes to build, and eight on the opposite side of the street. There would certainly seem to be no reason for taking 60 per cent of all the houses nearest to the street, as contended by plaintiff. The City Manager, in reporting to the Council, took the average on both sides, which is a distance of 34⅔ feet; taking the average between the nearest 60 per cent to the street and the farthest, gives a distance of 34.38 feet, giving just a slight difference from the result obtained by the method employed by the city manager, as aforesaid.

In Section No. 8 of plaintiff's petition, he alleges that the ordinance in question is unconstitutional in that it per-

mits unjust discrimination by the Council. Section 245 of the ordinance, provides that the Council, in its discretion, may grant or refuse a permit to erect buildings closer to the street line than is provided by the ordinance. Plaintiff seems to think that the section aforesaid gives the Council power to do whatever they think is right regardless of the provisions of the Act, but it is clear that the ordinance was not intended to grant any such power, and does not, in fact, grant any such power. Cases may arise under such a plan and scheme of city development and growth as is outlined by the several ordinances in existence in the City of Roanoke, where the strict letter of the provisions would work hardship, without any corresponding advantage to the community. It was the purpose of this provision and other provisions of the ordinance limiting the power conferred to vest in the Council power to prevent such hardship.

Defendants insist that the provision is a reasonable one and should be upheld. Moreover, if the provision is invalid for the reasons assigned by plaintiff, defendants deny that it renders invalid the whole ordinance on the subject, or that the plaintiff is in any way injured thereby.

Defendants further answering said petition deny that it is any hardship on the plaintiff to require him to set back [fol. 24] his proposed building, and they deny that his property will be rendered valueless by requiring him to do so, or that the enforcement of the restriction in question deprives him of any right guaranteed either by state or federal law.

As to what is said in Section 10 of petition about zoning the city, defendants say that as hereinbefore shown, the Council of the City of Roanoke has divided the city into districts, as contemplated and provided for by the State Enabling Act on the subject.

And having fully answered defendants pray that the writ of mandamus asked for in the petition be not awarded, and that the said petition be dismissed, and as in duty bound, they will ever pray, etc.

Charles D. Fox, B. J. Fishburn, J. R. Comer, Luther G. Stiff, W. M. Shickel, Councilmen; B. J. Fishburne, Mayor; D. P. Magann, Building Inspector, by R. C. Jackson, City Solicitor.

Exhibit to Demurrer and Answer

In the Council for the City of Roanoke, Virginia, the 11th Day of July, 1924

No. —.

An ordinance to amend and re-enact Sections 244 and 245 of an ordinance adopted by the Council of the City of Roanoke on the 26th day of August, 1922, entitled, "An Ordinance to regulate buildings in the City of Roanoke."

Be it ordained by the Council of the City of Roanoke that Sections 244 and 245 of an Ordinance adopted by the Council of the City of Roanoke on the 26th day of August, 1922, entitled "An Ordinance to regulate buildings in the City of Roanoke," be amended and reordained so as to read as [fol. 25] follows:

Section 244. That the line of the existing houses shall be the line upon which sixty per cent of the houses in the block in which the proposed building is intended to be erected, have with relation to the street, and the said proposed buildings must be at least as far from the street as the line established by said sixty per cent of the houses. The word "block" herein used does not refer to any entire city square, but shall be construed to be that portion on the same side of the street upon which the new buildings is proposed, bounded by the nearest intersecting streets to the right and left of said proposed building.

Section 245. That if there be not more than two houses in the block upon which said building is proposed to be erected, that the building line of said new structure may be such line as shall be fixed upon by an average line for the owner of said building, provided, however, that in no event shall the front of the proposed building be nearer than twenty feet from the front line of his said lot, exclusive of the sidewalk, in case his said grant shall carry him to the street line. Provided, however, that the Council within their discretion may grant or refuse a permit to erect buildings closer to the street than hereinbefore provided, in any block wherein there now exists buildings used for business or mercantile purposes, accordingly as their

judgment will dictate whether the proposed buildings will subserve the general welfare of the neighborhood and city, and provided, further, that they shall grant a permit whenever in their judgment *in* the block to contain the proposed building has a greater value for business or mercantile purposes than for residential purposes.

In Circuit Court of City of Roanoke

Judgment

This day came the parties by their attorneys, and all matters of law and fact in controversy in the above styled cause having been submitted to the Court for decision upon the petition of S. M. Gorieb, and exhibits filed therewith, upon the demurrer and answer of the defendants to the petition, and petitioner's joinder in demurrer and replication to the answer, upon the evidence of witnesses introduced on behalf of the petitioner and the defendants, and [fol. 26] was argued by counsel.

On consideration whereof, the Court being of the opinion that the ordinance complained of is valid and unobjectionable in all particulars, doth accordingly so declare and order. And it is further ordered that the petition be, and the same is dismissed, and that defendants recover costs against petitioner, to all of which rulings and judgment of the Court, as aforesaid, petitioner excepts.

And petitioner desiring to apply to the Supreme Court of Virginia for a writ of error and supersedeas from the decision and judgment of the court, as aforesaid, it is ordered that the execution of this order be suspended for a period of ninety days upon petitioner, or someone for him, executing bond before the Clerk of this Court in the penalty of $250.00, conditioned according to law.

In Circuit Court of City of Roanoke

Bill of Exception Number One

Be it remembered, that upon the trial of this case, the plaintiff and defendants in order to maintain the issues

joined on their part respectively, introduced the following evidence:

HENRY L. FRANCIS

HENRY L. FRANCIS, sworn.

Direct examination.

By Mr. Birchfield:

Q. Mr. Francis, are you a real estate dealer in the city of Roanoke?

A. Yes, sir.

Q. How long have you been in the real estate business in the City of Roanoke?

A. Between 15 and 17 years.

Q. As a real estate dealer in the City of Roanoke, are you familiar with the real estate prices in the city?

A. Yes, sir, I think so.

Q. Are you familiar with the location of S. M. Gorieb's property on the northeast corner of 11*st* Street and Pat- [fol. 27] terson Avenue, S. W., in Roanoke, Virginia?

A. Yes, sir.

Q. Mr. Gorieb owns a corner lot without any building—vacant lot?

A. Yes, sir.

Q. Does he own the adjoining property, a house and lot?

A. I think so.

Q. Mr. Francis, I wish you would please tell the court whether or not this lot is suitable for business property, and how much you would value it at for business property, and how much for residence property?

A. As residence property that lot would be worth about $3,500.00 or $4,000.00, and as business property, I would say $8,500.00.

By the Court:

Q. What is the size of the lot?

A. I was speaking of the 50-foot lot, but he has a 67-foot lot on the corner, that vacant lot.

By Mr. Birchfield:

Q. How many feet does he have in the residence property adjoining?

A. I really do not know, but I think something like 75 feet, I am not sure.

Q. Mr. Francis, will a store building located back from the street line of Patterson avenue 32 2-3 feet be as valuable for store purposes as the store building located on the street immediately adjacent to the street line on Patterson Avenue?

A. No, sir.

Q. As a matter of fact, is a store building located back from the street line 20 or 30 feet of any value for mercantile purposes?

A. I wouldn't say any, but it would not be of very much value as a mercantile business.

Q. In your experience as a real estate dealer, can you testify as to whether or not a building located back from the street line—whether or not it will bring as much at a sale for business purposes as the building located immediately adjacent to the street line?

A. No, sir, I do not.

Q. Do you know about how wide Patterson Avenue is at this point?

A. I think between 60 and 70 feet.

[fol. 28] Q. Is it, or not, the widest street in Roanoke City?

A. I think it is, if not wider than any of them.

Q. Do you think it is probable in the growth of the city that this street will have to be cut any wider?

A. No, sir, I think not, it is wider than Jefferson and Campbell Avenue now.

Q. On 8th Street, S. W., from Second Street, from this street is there not some business building, located on the street line?

A. Yes, sir.

Q. On 12th Street in the next block, is there not two store buildings located on the street line?

A. Yes, sir, on Patterson and 12th.

Q. Mr. Francis, please state the location of this property in reference to the outside boundary lines of the city. In other words, is it or not, near the center of Roanoke City?

A. Well, sir, I really cannot say as to that, but just from general knowledge, I would say that it would be pretty close to the center of population.

Q. In other words, it is a good location for a business house?

A. Yes, sir, a splendid location.

Cross-examination.

By Judge Jackson:

Q. What are the dimensions of the Gorieb lot?

A. I think it is 67 x 150, I think that is the size of it.

Q. What would you say the value of that lot is for residential purposes?

A. About $4,000.00.

Q. And for business purposes what figure would you give?

A. Well, sir, I think for a man to put a store there, it would be worth to him $8,500.00 or $10,000.00.

Q. Do you know what he has been asking for the lot for any and all purposes?

A. No, sir, but I think right around $9,000.00 or $10,000.00.

Q. That is a residential section there, isn't it?

A. I think so.

Q. Very pretty street, isn't it?

A. Very pretty.

[fol. 29] Q. One of the prettiest streets in the city, isn't it?

A. Not along there, just up above 12th street it is very pretty.

Q. When you say that this lot is worth from nine to ten thousand dollars for business purposes, you do not mean to say that it wouldn't be worth anything for business purposes if the business house is back on the line?

A. No, sir, I don't mean to say it wouldn't be worth anything, of course not.

Q. What, in your opinion, would be its value, with a business house setting back on the line?

A. About the same as it would be for residence property, about $4,000.00.

Q. You have spoken of a business house out on the street beyond there. What kind of a building is that?

A. Brick building.

Q. For what purpose is it used?

A. One is a grocery store, and the other is a drug store.

Q. It is directly on the street line, is it?

A. I think so—no, I think it is possibly a foot and a half off the side walk.

Q. It is 4 or 5 foot, isn't it?

A. Possibly so.

Q. Averaging the buildings there from an equal consideration, the one or two buildings there that are east of this property, whether the buildings set out in front of the properties, average up in that way?

A. I wouldn't consider it an equal consideration?

Q. You would not?

A. No, sir.

Q. It depends on what the man does, or what business he has there?

A. Yes, sir.

Q. Are you connected with this proposition for the sale of this property by Gorieb in any way?

A. No, sir.

Q. Have you had it in your hands for rental, or sale, or disposition as to business property?

A. He told me to sell it if I could.

Q. And you are trying to sell it?

A. Yes, sir, I would like to.

Q. Did you make this tentative deal with the Piggly Wiggly people they have been talking with some time?

[fol. 30] A. No, sir.

Q. You tried to make it, didn't you?

A. No, sir.

Q. Do you know what real estate agent put that through?

A. I don't know.

By the Court:

Q. Mr. Francis, do you consider that the building of this store out to the street line would damage the residential property in close proximately with the store?

A. The only damage that would accrue there, would be to the property immediately next door, and I think that belongs to the same man.

Redirect examination.

By Mr. Birchfield:

Q. Mr. Francis, you haven't had any deals with anybody to sell this property provided they would put a store building on it, have you?

A. Yes, sir, once or twice.

Q. And the reason they wouldn't buy it for business purposes is, because they couldn't put a business building there?

A. Yes, sir.

Witness stands aside.

E. W. Speed

E. W. Speed sworn.

Direct examination.

By Mr. Birchfield:

Q. Mr. Speed, how long have you been in the real estate business in the City of Roanoke?

A. 20 years.

Q. In your experience dealing in real estate in Roanoke City, are you more or less familiar with the values of property?

A. Yes, sir.

Q. Are you familiar with the location of S. M. Gorieb's property, on Patterson Avenue and 11th Street?

[fol. 31] A. I am acquainted with it.

Q. Do you consider that property more valuable for a store building, or for a residence building?

A. Well, I consider that—well, I don't know that it would be valuable for residence property or business property either one.

Q. Would the owner realize as much from the property as a residence as he would for business?

A. No, sir, I don't think he would.

Q. How much would that property bring as a residence lot?

A. I think between $4,000.00 and $5,000.00.

Q. What would it bring for the purpose of a store building?

A. My idea is, it would bring more, I judge in the neighborhood of $6,000.00 or $7,000.00, would be my judgment.

Q. For a store building?

A. Yes, sir.

Q. In building a store building on that property, would the store be of as much value to set it back from the property line 32⅔ feet as it would be to build it up immediately adjacent to Patterson Avenue?

A. It would depend on the class, and style, if it were a brick store, it would be more valuable set up against the street.

Q. In leasing a store building to Piggly Wiggly Company, for one of their trade stores, would the store building be as valuable set back from the street line as it would be immediately adjacent?

A. No, sir, it would not.

Q. What location is this property in reference to the outside corporate limits? Is it near the center of the city?

A. 2 miles from here to S. Roanoke, and about 2 miles to the southeast section, practically near the center of the city corporate limits.

Q. This property lies in a westerly direction from the center of the city?

A. Yes, sir.

Q. I mean from the business center?

A. Yes, sir.

Q. Beyond this property there is a residence district of Roanoke City for what distance?

[fol. 32] A. Well, Raleigh Court extends out from this property about two and a half miles.

Q. This property is about 2½ miles on this side of the corporate limits of the residential district of the city?

A. Not the corporate limits, you can go pretty near to Salem—2½ miles to the Raleigh Court line I meant. It is not as thickly settled in Lee High Court as in Raleigh Court.

Q. In the growth of Roanoke City, Mr. Speed, is it, or is it not, necessary to have grocery buildings at other places in the city than right in the center of town?

A. It is not necessary, but I should think far more convenient for the people that live in those sections.

Cross-examination.

By Judge Jackson:

Q. Mr. Speed, there is a grocery store out just west of this Gorieb lot, isn't there?

A. Yes, sir, just a block on the next corner.

Q. Good grocery stores carry good stock?

A. Yes, sir.

Q. And doubtless, so far as you know, furnish the necessities of the local community?

A. Yes, sir, it might do so.

Q. You say that this lot would be worth something more for business purposes than it would be for residential purposes?

A. Yes, sir.

Q. That is the way of any residential section in the city, or most of the residential sections close in?

A. Yes, sir, that is true.

Redirect examination.

By Mr. Birchfield:

Q. Mr. Speed, in Raleigh Court, in its residential section, wouldn't property there be more valuable for business than for residence purposes?

A. Some parts.

Q. But that doesn't hold throughout all the resident section of the city?

A. No, sir. I will qualify that if you will permit me. Property changes from one condition to another in the city [fol. 33] as it is growing; in our business section here is where residences used to be, and as the business grew the property became more valuable, all up Campbell Avenue and Patterson Avenue, that property along there used to be first class residence property, but now apartment houses and garages have taken the place.

Q. In this immediate vicinity, this was residence property?

A. At one time, it was one of the best residence sections of the city.

Q. But it is not now?

A. The growth of the section has changed from practically a residential section to a semi-business section.

Q. And from the growth of the city it will be necessary that that grow into business property?

A. Yes, sir, I believe it has got to stride; we even have stores out in Raleigh Court.

Recross-examination.

By Judge Jackson:

Q. This is a residential section, isn't it?

A. It is a semi-residence section.

Q. What you mean?

A. It has residences and business houses, too.

Q. Where?

A. At the corner of 12th and Patterson Avenue.

Q. That was put there before this ordinance was passed?

A. That wouldn't affect the ordinance.

Q. You spoke about the necessity for business, about its growing, etc., you know as a matter of fact, that the whole of Jefferson Street has been declared to be a business street, hasn't it?

A. A greater part of it and a portion of Campbell Avenue and Patterson Avenue out there has.

Q. Don't you think that we have streets enough designated at this time, and threatened as business sections, to serve the interest and public in Roanoke City for years to come?

A. Yes, sir, but it is certainly more convenient to have these stores out in the section where they live.

Q. You don't need a half dozen stores out there in that [fol. 34] section?

A. No, not in that section.

Q. In Raleigh Court, the stores that you speak of are down in what is rather a business section of Raleigh Court?

A. Semi-business section.

Q. If somebody was to come out on your street and want to stick a store house on the street line out in front of the buildings, don't you think it would hurt it?

A. If there were no other business buildings it certainly would.

Witness stands aside.

J. G. Holt

J. G. Holt sworn.

Direct examination.

By Mr. Birchfield:

Q. Mr. Holt, you are a real estate dealer in Roanoke City, I believe?

A. Yes, sir.

Q. Are you familiar with the location of the property belonging to Mr. Gorieb on Patterson Avenue and 11th St. S. W.?

A. Yes, sir.

Q. Please state whether you consider the vacant lot worth more for a store building, or for a residence lot?

A. I consider the lot is worth more for business than it would be for a residence. Take my own self for instance; if I were going to buy, I could not afford to pay the price on the lot for residence, and then I would not consider that corner there as nice a location as many other places, because colored people live at the rear, and for business it is worth considerably more than it would be for a residence.

Q. In constructing a store building there for a grocery store—for a grocery business on that corner, would a store building be as valuable set back off the street as it would set up immediately adjacent the street line?

A. No, sir, I wouldn't think so.

Q. There are store buildings right in the block above [fol. 35] that?

A. Yes, sir, a drug store and a grocery store.

Q. And then on 18th Street this way, is there or not, business buildings there?

A. Yes, sir, a grocery store and two garages, I believe.

Q. Mr. Holt, this is one of the oldest residence centers of the city?

A. Yes, sir.

Q. And residences have been built up for miles beyond this section?

A. Yes, sir.

Q. And it is one of the widest streets in town?

A. I am not positive, but I believe Patterson Avenue is about the widest.

Q. About how wide is it?

A. About 65 or 70 feet I think, I wouldn't be positive, but I think it is the widest street in town.

Q. That street is a good deal wider than any of the streets—the business streets in the congested business districts of the city, isn't it?

A. Yes, sir, I think so.

Witness stands aside.

S. M. Gorrie

S. M. Gorrie sworn.

Direct examination.

By Mr. Birchfield:

Q. Mr. Gorrie, are you the owner of the lot facing on Patterson Avenue at the intersection of Patterson Avenue and 11th Street?

A. Yes, sir.

Q. You own the adjoining property there, too?

A. Yes, sir.

Q. Have you been able to sell that lot for business purposes?

A. Yes, sir, many times.

Q. Why didn't you sell it?

A. After they found they couldn't get a permit to put the building out to the street they wouldn't buy it.

Q. Have you an offer to lease with the Piggly Wiggly people for an up-to-date store to be run in a building there, provided you can build it at the street line?

[fol. 39] A. Yes, sir.

Q. Is that lot of any value to you with the restrictions required to build back 32½ feet from the street?

A. No, sir.

Q. I believe you say you own the adjoining property?

A. Yes, sir.

Q. How much do you include in both pieces, how much do they front on Patterson Avenue?

A. 140 feet.

Q. You own practically 3 lots?

A. Yes, sir.

Q. Do you consider to build a store building there, would, in any way, be injurious to the property that you own next door?

A. No, sir.

Q. In the event that you build on the corner lot do you believe that will hurt the value of your residence property?

A. No, sir.

Cross-examination.

By Judge Jackson:

Q. You say that lot would not be of any value to you, unless you can put a business house on it, up with the street line?

A. I can't come out at it, if I don't put a business house there.

Q. You will want to give it away then?

A. No, sir.

Q. You say it won't be any value to you?

A. I say I can't come out at it. It will not be much value, I will be losing money.

Q. How much did you give for it?

A. $7,000.00, and that is why I say I can't come out at it unless it is sold for business property.

Q. You gave $7,000.00 for the lot?

A. Yes, sir.

Q. When did you buy it?

A. About 18 months ago.

Q. Who did you buy it from?

A. From Mr. Francis, the real estate man.

Q. Have you got what you call your tentative contract with the Piggly Wiggly to construct some sort of building [fol. 37] on it?

A. Yes, sir.

Q. Where is it—you got the contract?

A. No, sir, they wait on me until I get my permit.

Q. It is conditioned on you getting your permit?
A. Yes, sir, they won't sign to take the store back from the sidewalk.
Q. Do you live up there in that house of yours?
A. No, sir.
Q. How much do you rent it for?
A. $100.00 per month.
Q. Where do you live?
A. 1503 Salem Avenue.
Q. What is your nationality?
A. Assyrian.

Redirect examination.

By Mr. Birchfield:

Q. When you purchased this lot, did you purchase it for a residence or a store?
A. For a store building.
Q. At the time you purchased the lot then, you had no intention of anything keeping you from putting a business building there?
A. No, sir.

Recross examination.

By Judge Jackson:

Q. What year did you buy it?
A. 18 months ago.
Q. What month and what year?
A. I don't remember, my deed will show that.
Q. About 18 months ago, you say?
A. Yes, sir.
Q. That was after this ordinance had been passed?
A. I didn't hear about it.
Q. It was the law, but you didn't hear about it?
A. I come to Mr. Magann, and he told me.

Witness stands aside.

[fol 38] EVIDENCE INTRODUCED ON BEHALF OF THE DEFENSE

C. L. CARTER

C. L. CARTER sworn.

Direct examination.

By Judge Jackson:

Q. Mr. Carter, what is your business?

A. N. & W., work for the salvage department.

Q. Where do you live?

A. 1020 Patterson Avenue.

Q. Do you own property on that avenue?

A. Yes, sir.

Q. How is your property situated with reference to this corner lot of Gorieb's?

A. I am 5 doors east of 11th street on the opposite side from the vacant lot.

Q. What kind of property is yours?

A. I consider it good. I am very well satisfied with it, and have worked for 20 years to make it good.

Q. How about that section, take that avenue and the block in which this Gorieb lot is situated. I would like for you to describe to the court the character of the buildings there, how they are setting with reference to the street, and the state of improvement, etc.?

A. That section as a whole, is a nice resident section, and 75 per cent of the property, I would approximate, is owned by the resident people who live in their own property, and they take a great pride in taking care of their property and its condition, and these houses set back from 25 to 40 feet.

Q. It is one of the prettiest streets in Roanoke City, isn't it?

A. Yes, sir, I think so.

Q. The description that you gave of the properties there, and the homes of the people, as a whole, there are no sorry buildings among them, they are all a good class of buildings?

A. Yes, sir, a good class.

Q. Is there any other business houses near this place—in other words, how near is that grocery store to this [fol. 39] place?

A. On the corner of L[illegible] and Patterson there is a grocery store, and that drug store has been there for 15 or 18 years.

Q. Are they sufficient to supply to the people with groceries, food and medicine?

A. If it is not, there are five more within a radius of two blocks.

Q. They have been there for years?

A. Yes, sir, we have sufficient grocery stores up there?

Q. Are you acquainted with the situation where this grocery and drug store is located out on 12th street?

A. Yes, sir.

Q. Mr. Francis didn't think that that was an unsightly situation, or that it would damage any of the houses in front of it, or around it, to put this building up to the street line. What is your idea about it?

A. It is injurious to the residence property to have a grocery store right in front or next door, certainly it is, there is always more or less garbage from any grocery store, and there is no residence property that I know of in this ten hundred block for sale.

Q. Where this store is set up to the street and the house next to it is setting back, and the store up in front, that battles the houses up, doesn't it?

A. Yes, sir.

Q. Mr. Carter, what in your opinion, will be the effect of such a building as this man proposes to erect on this lot there, flush with the street line, on the property in that section?

A. I don't think it will damage the value of my property, not to the extent it will others close by and across the street, and adjacent to mine on the next block across the street. I think any reasonable man will agree with me about the grocery store.

Q. Can you say to what extent that will be true?

A. No, sir, I cannot in dollars and cents.

Q. But you are satisfied that other properties there would be much less valuable?

A. Yes, sir.

Q. With a store building on that lot up to the street line, than they are now?

[fol. 40] A. Yes, sir

Q. I want to direct your attention to travel on that street?

A. It is one of the busiest streets in town; I think we have 50 jitneys and a double street car track.

Q. This is a corner lot, is it?

A. Yes, sir.

Q. With a store house building up to the street line on this corner, how would it effect the travel? State whether or not it would increase the danger from travel, and affect the street car traffic?

A. Absolutely so, with their trucks, etc., out there, it would block the cars.

Q. It would obstruct the view on the avenue?

A. Yes, sir.

Q. Obstruct the avenue coming up Patterson Avenue and 11th Street?

A. Yes, sir.

Q. And of course if you have wagons and trucks out there in front on that corner, you would still further obstruct the view where there is immense travel?

A. Yes, sir.

Q. Did you notice whether wagons or vehicles parked in front of a store, if it is built there upon the street line—at the lot front would obstruct the view?

A. I don't understand you.

Q. All right; here is the curb in front, and the store here, now with reference to wagons standing in there, would there be room for them to stand there in that place? If he backed in there he would obstruct the street, and there would be no passing between there and the street car line?

A. No, sir.

Cross-examination.

By Mr. Birchfield:

Q. You feel right strongly in this matter, don't you?

A. Put that plainer, won't you, I don't understand.

Q. You have a good deal of feeling in this matter, haven't you?

A. No, sir.

Q. You are right interested?

A. Yes, sir.

Q. Didn't you go to Mr. Sam Hubbard, manager of the Piggly Wiggly stores, an- ask him not to sign the leases? [fol. 41] A. No, sir.

Q. In your conversation with them, didn't you ask them not to take this lease on that corner?

A. No, sir, I explained it to them, and talked to them about it, and told them how it would be.

Q. You live at 1020 Patterson Avenue?

A. Yes, sir.

Q. And own your property?

A. Yes, sir.

Q. The property across the street is for sale next to Gorieb's property, isn't it?

A. Not that I know of, there was a sign on it sometime ago.

Q. There has been a sign on it?

A. There has been, but there is no sign there now.

Q. There are 15 houses in that block, are there not?

A. I think so.

Q. If the property next to the Gorieb property, and the Gorieb property and the lot next to the Gorieb property is for sale, that is more than 95 per cent of that property for sale?

A. You have got me tangled up.

Q. You said just a few minutes ago that there had not been a piece of property sold on that street, or that immediate neighborhood for a number of years, and that you knew of none for sale?

A. I didn't say a number of years, I mean by that, it has been some time.

Q. How wide is that street in front of your house?

A. 60 or 65 feet.

Q. Is that street wider than the congested district of the City of Roanoke—I mean the center of the business town?

A. I presume so, that street was built later, I mean after the streets were laid off down town for the business district.

Q. There are grocery stores on down in the center of town?

A. Yes, sir.

Q. They are able to park wagons and trucks about and around the store without interfering with the traffic and the

street car traffic down in the center of the congested business [fol. 42] district of the town?

A. Yes, sir, I should think so, they do any way.

Q. Please tell this court why you stated a few minutes ago that the street cars would be blocked in this place by a wagon or truck being parked there?

A. To park a wagon in front of this grocery store, the horse's head, or the automobile radiator would naturally be towards the street car line. I don't say he would block the street car from moving, but he would block anything going west.

Q. Is there any street in town wide enough for a truck or wagon to back diagonally across the street, and at the same time to allow the passage of any vehicle between the street car and wagon?

A. Not that I know of.

Q. So that makes the situation in this part of town the same—there is no difference from the situation there than in any other part of the town?

A. Possibly not.

Q. There are five other grocery stores within a radius of two blocks of your house?

A. Yes, sir.

Q. What kind of inhabitants live right back of the Goriech property?

A. Adjoining block back of Goriech property is a vacant lot.

Q. Along the street next back of the Goriech property, is that for white or colored people?

A. That is Rorer Avenue. Between 9th and 10th is the colored district.

Q. How long ago has it been since those houses were built in this block that have been there a number of years?

A. Been there from 20 years on down.

Q. Most of them are old, are they not?

A. Yes, sir, but some of them have been remodeled.

Q. At the time these houses were built there was no Raleigh Court at that time, was there?

A. I think not.

Q. Since these houses have been built the residence district has been extended from Patterson Avenue for several miles westward?

A. In answering that I would say, the residential section of Patterson Avenue has practically built out beyond 20th Street, they have broadened out; they crossed the river at Virginia Heights. I believe when Virginia Heights was started, there was no Raleigh Court, and then Virginia Heights filled up pretty well and then Raleigh Court [fol. 43] filled up.

Q. How far does the residence district now extend west of the Gorieb property—approximately?

A. In the Raleigh Court direction?

Q. Yes, sir.

A. I would say 2½ miles, nearly all the way to Salem, we could carry that on indefinitely the way they are building up on the road.

Q. In what way will this store damage your property, Mr. Carter?

A. The same way it would yours if you were in the same position I am in.

Q. In other words, you don't like to sit over there on the porch and look at a nice store building, that is the situation, isn't it?

A. I think, Mr. Birchfield, if I wanted to sell the property that I couldn't get as much for it after the store was put there, as I could at the present time, if I wanted to sell.

Q. Why do you think a store building would hurt the sale of your property?

A. Going by experience of others.

Q. What someone else told?

A. Experience of others and conditions.

Q. Based on what you have been told?

A. (Witness does not answer.)

Q. You don't object to looking at the store building as long as you live there, but you think if you would go to sell your house that it would decrease in value as residence property because of the store building being there?

A. No, sir, I object for several reasons. I understand that there is a city ordinance that prevents a person from building his property on the line with the street, there is no use trying to burst up the City Ordinance.

Q. That is the only reason then?

A. No, two or three reasons—for the reason, as stated before, that I think it will depreciate the value of my property.

Q. And that statement is made on the information of other parties, and not from any actual experience or knowledge from yourself?

[fol. 44] A. No, sir.

Q. So you understand that we are trying to burst up the City Ordinance, who told you that?

A. It seems to be that way.

Q. Do you know that Mr. Gorieb tried to get the city to allow him to build a building 10 feet back from the street line, and he offered to build in front of this building, concrete clear out to the street, or anything the city desired, or beautify it with flowers?

A. No, sir, I didn't know that.

Q. What is the distance of those houses from the street?

A. They vary in distance.

Q. No two of them are on the same line?

A. Yes, sir. On the side of the street where the store is proposed to be built, the buildings set back further than on the south side.

Q. Is there any regularity there?

A. Yes, sir, reasonable uniformity.

Q. I believe you stated that a building on that corner would increase the danger in the traffic?

A. Yes, sir.

Q. In any of the congested districts in the City of Roanoke, there is some risk in traffic?

A. Yes, sir, that is why they have traffic cops.

Q. Some of the busy corners do and some do not?

A. It looks like from the way they cut through they might have some more.

Q. On the corner of 12th street and Patterson Avenue there is a store building?

A. Yes, sir.

Q. Don't you think the same risk is on that corner now, as would be after the building was erected on this corner?

A. I do.

Q. So the condition is not different where the buildings are built up to the street line, except where they have traffic cops?

A. No, sir.

Redirect examination.

By Judge Jackson:

Q. You spoke about the value of this man's property for business and residential services. Did you discuss with him about the time he bought this property about his purchase, [fol. 45] and what he was paying, etc.?

A. Yes, sir, sometime after that.

Q. What did he say?

A. He said he brought the property for a filling station, and found he was in wrong, and he told me he was going to build an apartment house, and I asked him what kind of an apartment house he was going to build, and he said "as good as was in Roanoke, $25,000.00 apartment."

Q. Where did he say he was going to put it?

A. Back from the line.

Q. Did he try to sell it to you?

A. Since then he has talked and tried to sell it.

Q. What value did he put on it?

A. $8,500.00, if I remember correctly.

Q. He knew that at the time he bought this property he couldn't put a business house on it, didn't he?

A. I don't know, sir.

Q. You say he wanted to put a filling station on it?

A. That was my understanding.

Q. You understood that from him?

A. Yes, sir.

Recross examination.

By Mr. Birchfield:

Q. You said that Mr. Gorieb stated to you that he was buying it for a filling station?

A. That was my understanding.

Q. Was that before or after he bought it?

A. After he bought.

Q. Or was it your impression that he was buying for a filling station?

A. That was what I gathered in talking to him.

Q. And later he was going to build an apartment house?

A. Yes, sir.

Q. Did he tell you the reason he wanted to get rid of it — because he couldn't use it under the City Ordinance?

A. No, I don't recall that.

Witness stands aside.

[fol. 46] J. W. Neighbors

J. W. Neighbors sworn.

By the Court: What is the relevancy of all this testimony?

By Judge Jackson: We want to show that it is strictly a residential section, and to put business property there on that corner, would increase the danger of travel, and make it more hazardous at that corner for the public.

By the Court: Where is the original City Ordinance? Is this a copy of it or not (looking at City Ordinance).

By the Court: I don't think any of this evidence affects the question one way or the other.

By Judge Jackson: We want to ask him a few questions.

By the Court: All right, go ahead.

By Judge Jackson.

Q. What is your name?

A. J. W. Neighbors.

Q. Do you live in that section out there?

A. Yes, sir. I live at 1103 Patterson Avenue.

Q. Are you acquainted with the section in which Goriel proposes to build this store?

A. Yes, sir, it is 150 feet from me; that street is a residence section, and has been for many years.

Q. You say it has been a residence section for many years?

A. Yes, sir, I considered it always, practically, a residence section.

Q. What is the character of the properties, and of the homes of the people along this street?

A. From 8th Street west, it is good, now below 8th St. it is not so good, but from 10th on up to 17th, I consider that extremely good.

Q. Are the houses set back from the lines?

A. Yes, sir.

Q. Improved homes, modern property?

[fol. 47] A. Yes, sir, most of them.

Q. What effect do you think it would have in that community, to build a store up to the street line—would that affect you?

A. It would hurt me, yes, sir.

Q. Do you think it would reduce the value of your property?

A. Yes, sir, it would.

Q. What is your age?

A. 60 years old.

Q. Do you own your own property?

A. Yes, sir.

Q. Do you think it would greatly depreciate in value in that section for residence purposes?

A. Yes, sir.

Q. Can you give any idea of the per cent of reduction you think it would effect the value of the property?

A. I have been offered $10,000 for my house, and if that store goes there, I will take $8,000.00 for it.

Q. Something has been said about the hidden corner there that would be produced, and its effect on travel if you put that building on the street line. Is there a great deal of travel on Patterson Avenue?

A. Yes, sir, I have figured on that. I believe from 4 o'clock in the morning until 10 o'clock at night, there is a street car or a jitney every three minutes.

Q. Is that 11th Street across there frequently used too?

A. Yes, sir, a great deal of travel, and I consider that one of the most dangerous corners on Patterson Avenue for the simple fact; when you come across 11th street, intersecting Patterson, that would obstruct the people coming up Patterson Avenue, and there has been more wrecks right there on that corner than any place on Patterson avenue.

Q. You know that to be a fact?

A. Yes, sir.

Q. People out there, all of them, are opposed to signing this petition?

A. Yes, sir.

Q. Asking that this be not permitted?
A. Yes, sir, they have.

[fol. 48] Cross-examination.

By Mr. Birchfield:

Q. How long have you been living out there, Mr. Neighbors?
A. It will soon be five years.
Q. And you live about 150 feet from the corner lot?
A. Yes, sir, around 150 feet.
Q. Which side?
A. On the same side.
Q. Your property for sale, or has it been for sale?
A. No, sir, but I have had it for sale, but never sold it.
Q. You say that there is more traffic, or as much traffic on Patterson Avenue as any other street in the city?
A. I mean in the resident section.
Q. How about 8th street, is there as much traffic along there?
A. Not as much as on Patterson.
Q. Is 8th Street an improved street?
A. I don't know so much about that, I don't think it is, though.
Q. How about 10th Street S. W., is there as much traffic there as on 11th Street and Patterson Avenue?
A. Yes, sir.
Q. Is that an improved street?
A. Not like Patterson Avenue.
Q. Not a smooth street?
A. It is not level.
Q. It has holes in it?
A. After you leave Rorer it has.
Q. You say your property would be damaged that you paid $10,000.00 for?
A. No, I have been offered $10,000.00 for it.
Q. You would sell it for $8,000.00 as soon as the store building went there?
A. That is the way I feel about it.
Q. What do you base that on?
A. One reason is, I don't want any store there, and I will be plain, we have stores enough there, we have 5 stores

within a radius of two blocks, and I don't think we need any more there.

Q. You just don't want to look at a store building?

A. No, I don't say that. I don't think we need it.

Q. There are many streets in the city with buildings [fol. 49] on the corner that are just as dangerous as that would be?

A. I suppose so.

Q. That then is no more dangerous than other places?

A. People travel down that street a great deal.

Q. You have had no experience in driving in Roanoke City, have you?

A. Yes, sir, about two years.

Q. You say the value of your property would be decreased on what somebody has told you about it?

A. No, sir.

Q. Why did you state the value would be decreased?

A. Because I have seen the effect of it.

Q. In what places have you seen the effects of it?

A. If you go out to 12th street don't you think that property would bring more?

Q. Don't you think that property with a nice brick building on it would make your property more valuable?

A. No, sir.

Q. Do you want Mr. Goriel to leave it vacant?

A. I don't care.

Q. Up there above you, that property won't bring as much as your property?

A. Why?

Q. Because there are store buildings up there?

A. I thought you had reference to the same block.

By Judge Jackson: I had some other evidence here that I wanted to introduce, but I don't see any use to go into it.

By the Court: I don't think there is any use going *any* any more of the evidence.

Witness stands aside.

S. T. Hubbard

S. T. Hubbard sworn.

Direct examination.

By Mr. Birchfield:

Q. Are you connected with the Piggly Wiggly Company? [fol. 50] A. Yes, sir.

Q. Has the Piggly Wiggly offered to lease the store building if erected on Patterson Avenue adjacent to the street?

A. I have submitted the proposition to the home office.

Q. Can you use a building, built back 32 2-3 feet from the street?

A. No, sir.

Q. Give the reason why it would not be advisable to have the store away from the sidewalk?

A. From experience. People won't walk 30 feet back, and we always aim to get our location right even with the sidewalk if possible, by having the store on the sidewalk, or even with the sidewalk, you have more trade and sell more goods.

Q. If this building is used by you for store purposes and erected up on the street line, will it be one of your up to date Piggly Wiggly stores?

A. Yes, sir, it certainly will.

Q. Clean and up to date?

A. Yes, sir.

Q. Will your company lease this property provided the building is erected near the street line?

A. Yes, sir, the location has been approved by our company for a store and we will take it?

Cross examination.

By Judge Jackson:

Q. What do you furnish to the public in your store?

A. We have the best stuff that is manufactured.

Q. What does your store furnish, what class of goods?

A. General line of groceries—the best that the market affords. Certainly as good.

Q. I understand you haven't got any lease, but your people say that is a good location?

A. Yes, sir, that is a good location, but we cannot make a lease until it is approved by the big boss.

Witness stands aside.

ORDER SETTLING BILL OF EXCEPTIONS

And the court certifies that the foregoing is the evidence and all of the evidence that was introduced by either party to the suit; and the plaintiff by counsel tenders this his bill of exceptions number 1 and prays that the same be signed, sealed and made a part of the record in this [fols. 51 & 52] action, which is accordingly done this the 11th day of April, 1925.

H. B. Gregory, Judge. (Seal.)

Clerk's certificate to foregoing transcript omitted in printing.

Minute entry of argument and submission June 26, 1926, [fol. 53] omitted in printing.

[fol. 54] In Supreme Court of Appeals of Virginia

S. M. Gorier, Plaintiff in Error,

against

Charles D. Fox, W. M. Shickel, B. J. Fishburne, J. B. Comer, Luther G. Stiff, Members of the City Council of Roanoke, Virginia, and Douglas P. Magann, Building Inspector of the City of Roanoke, Virginia, Defendants in Error

Upon a Writ of Error to a Judgment Rendered by the Circuit Court of the City of Roanoke on the 2nd Day of March, 1925

Judgment. September 29, 1926

This cause, which is pending in this court at its place of session at Wytheville, having been fully heard but not determined at said place of session; this day came here the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel is of opinion, for reasons stated in writing and filed with the record that there is no error in the judgment complained of. It is therefore considered that the same be affirmed and that the plaintiff in error pay to the defendants in error thirty dollars damages, and also their costs by them expended about their defence herein.

Which is ordered to be entered in the order book here and forthwith certified, together with a certified copy of the opinion in this cause, to the clerk of this court at Wytheville, who will enter this order in the order book there and certify it to the said circuit court.

A copy. Teste: H. H. Wayt, Clerk.
A copy. Teste: J. M. Kelly, Clerk.

[fol. 55] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

OPINION—September 29, 1926

WEST, J.:

By an act of the General Assembly of Virginia, approved February 17, 1922, councils of cities were authorized to divide their cities into districts or zones, and to establish set-back building lines, and compel the property owners to conform thereto. The act, (Acts of Assembly 1922, p. 46), reads as follows:

"That for the promotion of the health, safety, morals, comfort, prosperity and general welfare of the general public, the council, or other governing body, of any city may, by ordinance, divide the area of the city into one or more districts, of such shape and area as may be best suited to carry out the purposes of this act, and in such district or districts may establish set back lines, regulating and restricting the location of buildings and other structures; their height and bulk; the percentage of lot to be occupied by buildings or other structures; and the size of courts and other open spaces, and the trade, industry, residences and other specific uses of the premises in such district or districts, provided that nothing in this act contained shall be construed as intended to authorize the im-
[fol. 56] pairment of any vested right."

On August 26, 1922, the council of the city of Roanoke, acting under the authority granted by this act, passed an ordinance regulating the erection of buildings in the city. Sections 243, 244 and 245 of the ordinance, as amended on July 11, 1924, read as follows:

Section 243. "That all buildings hereafter to be erected in the city of Roanoke must be built to correspond to the existing house line of the houses built in the same block unless special permission, otherwise granted by the city council; provided, that if the buildings to be erected shall be located upon a switching track of any commercial rail-road it shall be permitted to build closer to the street than the line of the existing houses."

Section 244. "That the line of ..e existing houses shall be the line upon which sixty per cent of the houses in the block in which the proposed building is intended to be erected, have with relation to the street, and the said proposed buildings must be at least as far from the street as the line established by said sixty per cent of the houses. The word 'block' herein used does not refer to any entire city square, but shall be construed to be that portion on the same side of the street upon which the new building is proposed, bounded by the nearest intersecting streets to [fol. 57] the right and left of said proposed building."

Section 245. "That if there be not more than two houses in the block upon which said building is proposed to be erected, that the building line of said new structure may be such line as shall be fixed upon by an average line for the owner of said building, provided, however, that in no event shall the front of the proposed building be nearer than twenty feet from the front line of his said lot, exclusive of the sidewalk, in case his said grant shall carry him to the street line. Provided, however, that the counsel within their discretion may grant or refuse a permit to erect buildings closer to the street than hereinbefore provided, in any block wherein there now exists buildings used for business or mercantile purposes, accordingly as their judgment will dictate whether the proposed buildings will subserve the general welfare of the neighborhood and city, and, provided further, that they shall grant a permit whenever in their judgment in the block to contain the proposed building has a greater value for business or mercantile than [fol. 58] for residential purposes."

On January 19, 1923, the council passed an ordinance dividing the city into two districts, one designated as the "Business District" and the other as the "Residential District."

S. M. Gorich is the owner of several building lots located in the "Residential District" on the northeast corner of Patterson avenue and Eleventh street, fronting on Patterson avenue 139 feet and on Eleventh street 150 feet, back to an alley. On the eastern portion of the lot he has a dwelling house, but there is no building on the western portion.

Gorich applied to Douglass Magann, Building Inspector,

for the city, for a permit to erect a store building on the undeveloped corner lot. The permit was refused and on June 12, 1924, Gorieb petitioned the city council to grant him a permit to erect a brick store building on the property, fronting 40 feet on Patterson avenue and running back adjoining Eleventh street for 75 feet. After an investigation, the council passed a resolution granting him a permit to build a brick store 34⅔ feet from the street line on Patterson avenue.

On August 11, 1924, Gorieb served upon the defendants a notice and petition for a writ of mandamus to compel the city to issue a building permit for the erection of a store building on the corner of Patterson avenue and Eleventh (fol. 59) street, adjacent to the avenue or nearer thereto than 34⅔ feet.

The petition alleges that the ordinances authorize the council to grant or withhold a permit to any individual at their pleasure, in violation of both State and Federal constitutions; and that said ordinances are unconstitutional and void.

Defendants filed their joint answer and demurrer, relying on the act of February 17, 1922, and alleging in the answer that the ordinance, properly construed, does not violate the State or Federal Constitution, and should be sustained.

The case was heard upon the pleadings and evidence submitted, and the court entered an order adjudging that the ordinance was valid in all respects and dismissed the petition. This is a writ of error to that judgment.

The plaintiff in error relies upon the following assignments of error:

"(1) The court erred in holding that the city council had the right to establish a set back building line and in the same ordinance reserve the right not to be guided by (fol. 60) the provisions of said ordinance.

"(2) The court erred in holding the city ordinance constitutional as it constitutes 'a taking' of private property for public use without compensation, therefore a violation of the provisions of both Federal and State Constitutions.

"(3) The court erred in holding that the ordinance was applicable under the facts presented in this case and in hold-

ing that under any construction of said ordinance the petitioner was prohibited from building nearer the street line than thirty-four and two-thirds (34⅔) feet."

The Virginia Constitution declares that the exercise of the police power of the State shall never be abridged. Sec. 159.

The legislature may, in the exercise of the police power, restrict personal and property rights in the interest of public health, public safety, and for the promotion of the general welfare. Eubank v. City of Richmond, 110 Va. 751; Welch v. Swasey, 193 Mass. 364, 79 N. E. 745, 118 Am. St. Rep. 523; Freund on Police Power, secs. 118, 128; Attorney General v. Williams, 174 Mass. 477; People v. D'Oench, 111 N. Y. 361; Barbier v. Connolly, 113 U. S. 27; [fol. 61] Bacon v. Walker, 204 U. S. 311.

The Eubank case involved the validity of a "building line" ordinance and of the act of the General Assembly of Virginia pursuant to which it was passed. The court held the act was constitutional. This case was appealed to the Supreme Court of the United States and is reported in 226 U. S. at page 156. While the judgment was reversed, the court did not hold that the enactment of the statute authorizing the establishment of building lines in cities was not within the police power of the State, but reversed the case because the city ordinance passed in pursuance of the statute required the street committee, upon request of the owners of two-thirds of the abutting property on any street, to establish a building line, thereby enabling one set of property owners to control the property rights of others, without fixing any standard by which they should be guided.

In the case of Welch v. Swasey, supra, involving the validity of building regulations, adopted by authority of an act of the legislature, the court held that the statute and the city ordinance were both constitutional. The judgment was affirmed by the Supreme Court of the United States, 214 U. S. 91.

It is not contradicted that the legislature may confer the police power of the State upon cities and towns located therein. The extent of this power is difficult to define, but it is elastic and expands automatically to protect the public

against the improper use of private property to the injury [fol. 62] of the public interest. It must never be exercised except in a reasonable manner and for the welfare of the public.

In Noble Bank v. Haskell, 219 U. S. 104, the court, discussing the police power, said: "It may be said in a general way that the police power extends to all the great public needs. Samfield v. United States, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

It is within the police power of the legislature to pass an act authorizing the councils of cities and towns to divide their municipalities into "districts" or "zones," and to establish building lines on the streets to which all property owners must conform; and such an act, if passed in the interest of the health, safety, comfort, or convenience of the public, or for the promotion of the public welfare, when not unreasonable, is constitutional and valid. Eubank v. City of Richmond, supra; Windsor v. Whitney, (Conn.), 111 Atl. 354, 12 A. L. R. 669; Lasalle v. Ferguson, (Tex.), 202 S. W. 317; Spector v. Building Inspector of Milton, (Mass.), 145 N. E. 265; Lincoln Trust Co. v. Williams Building Corporation, (N. Y.), 128 N. E. 209; Ware v. City of Wichita, (Kan.), 214 Pac. 99; Miller v. Moore Republic Works, [fol. 63] (Cal.), 234 Pac. 381, 38 A. L. R. 1479.

In Windsor v. Whitney, supra, the court while considering the question of set back lines said: "If a building line six feet from an owner's street line will tend to preserve the public health, add to the public safety from fire, and enhance the public welfare by bettering living conditions and increasing the general prosperity of the neighborhood, can it be done by legislative authority in the exercise of the police power where such an exercise of the police power is reasonable under the circumstances of the case? We hold that it can, and that this is not a taking of property in violation of the constitutional right, for which compensation must be made. The body of the law upon the subject of the police power is the growth of comparatively recent years. It has been said to be still in the formative stage.

"The line between eminent domain and the police power is a hard one to hold with constancy and consistency, and it is not surprising that now and again these two great powers of government have been confused. A few years ago it was, so far as the rule had been announced, undoubted that restrictions could not be imposed upon a private property [fol. 64] solely for aesthetic considerations. Later it has been said by high authority that aesthetic considerations may be regarded in connection with recognized police power considerations. And now Dillon, in the latest edition of his 'Municipal Corporations,' sec. 695, says: 'The law on this point is undergoing development and perhaps cannot be said to be conclusively settled as to the extent of the police power.' Welch v. Swasey, 214 U. S. 91, 53 L. Ed. 923, 29 Sup. Ct. 567, affirming 193 Mass. 364, 23 L. R. A. (N. S.) 1160, 118 Am. St. Rep. 523, 79 N. E. 765, tends to justify the author's conclusion.

"Where the free exercise of one's rights of property is detrimental to the public interest, the State has the right to regulate reasonably such exercise of control under the police power. And that, of course, means without compensation."

On the question of the validity of zoning and building line ordinances, the authorities are in conflict. A number of them sustain the contention of the plaintiff in error that such ordinances are unconstitutional and void. Val Fruth v. Board of Affairs, (W. Va.) 84 S. E. 105; St. Louis v. Hill, 21 L. R. A. 226; Philadelphia v. Leonrad, 97 Pa. 242. [fol. 65] The weight of authority and reason, as it seems to us, supports the contrary view.

All the presumptions are in favor of the validity of the ordinance. While the courts have held that, generally speaking, statutes and ordinances which vest arbitrary discretion in public officials, without prescribing a uniform rule of action, by which they shall be guided, are unconstitutional and void, this rule is subject to a qualification, "where it is difficult or impracticable to lay down a definite rule, or where the discretion relates to the administration of a police regulation and is necessary to protect the public morals, health, safety and general welfare." 12 A. L. R. 1435, 1447, citing numerous cases.

In Wulfsohn v. Burden, 241 N. Y. 288, 150 N. E. 120, 43 A. L. R. 651, the court, as appears from the syllabus, held, that the City of Mount Vernon had authority, under the police power, to establish zones or districts which should be limited to dwellings; that the fact that the zoning ordinance limits the use and depreciates the value of certain property within its limits does not affect its constitutionality; that a zoning ordinance is not invalid because of discrimination in the set-back from the street and in rear yards, as between apartmount houses and private dwellings; and that the city has the power to limit the height of apartment houses to be erected within residential districts, and prescribe the open area which shall surround them.

A New York statute required certain private bankers to obtain a license from the State Comptroller before they were allowed to do business, and authorized the Comptroller to "approve or disapprove the application in his discretion." It was held in Engle v. O'Malley, 219 U. S. 128, that the power vested in the Comptroller was not "arbitrary or capricious," and that the statute was constitutional [fol. 66] and valid.

Yee Bow v. Cleveland, 99 Ohio St. 269, involved the validity of a statute requiring a laundryman to secure a license from the health commissioner who was required to ascertain whether the applicant's place of business was sufficiently sanitary to protect the public health before granting the license. It was contended that the applicant's rights were left to the arbitrary discretion of the commissioner. The court held the ordinance valid, saying: "It is exceedingly doubtful whether a fixed standard could be adopted by the city in its regulation of those features." In disposing of the case the court said: "It is now generally held that quasi judicial duties and administrative functions may be imposed upon administrative officers for the purpose of ascertaining the conditions under which the law or ordinance becomes effective. It will not be presumed that the action of the administrative officer will be either arbitrary or unwarranted. Should it so prove to be, the aggrieved person would have the right to relief through the courts."

In Cutrona v. Wilmington, (Del. Ch.), 124 Atl. 658, 663-4, the court said: "The right of dominion over one's own

property, to use it as he sees fit so long as the rights of others are not infringed upon, is a right which not even the legislative power of the State can take from the individual. With respect to such proprietary interests, the extent of the State's power is that of regulation, and such regulation [fol. 67] must be of a kind that operates impartially and alike upon all persons similarly situated. Regulation in matters of this kind can never extend to the point of bestowing upon any official or officials the power to permit or deny, according as whim, fancy, or favoritism may suggest, the enjoyment of the right by the individual. The equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States denounces all attempts to subject the property rights of individuals to the unrestrained discretion or control of administering officials, *except in those special instances where the police power of the State may, within the appropriate field reserved to it, interpose its restraining arm.*" (Italics ours.)

The city of Roanoke, Virginia, has an ordinance providing that no person shall operate a motor bus on the streets of the city until he has passed an examination before the superintendent of police as to his ability to operate an automobile and his knowledge of the traffic laws and satisfied the superintendent of his character and qualifications. This court held in Taylor v. Smith, 140 Va. 217, that the city could, in the execution of its police power, invest its officers with a reasonable discretion in the performance of their duties whenever it is necessary for the safety and [fol. 68] welfare of the public; that such discretion was not arbitrary nor whimsical, and that the ordinance was valid.

Where a city has been built up without much regard to building lines, each citizen locating the buildings on his land according to his own wishes and without regard to the rights of others, the location of the buildings is frequently such that the establishment of any uniform building line will result in unequal burdens upon the land owners. To overcome such inequalities, section 243 of the Roanoke ordinance authorizes the city council to grant special permission to erect buildings not in conformity with the existing house line in the same block and nearer the street than such house line. The discretion thus vested in the council is not an arbitrary or whimsical, but a reasonable,

discretion, and does not authorize the council to grant a permit to A and refuse one to B under like circumstances and conditions. If they should exercise this discretion in an arbitrary manner, the party aggrieved would be entitled to relief through the courts.

In determining the distance Corich's store building should be located from the street line, the council, acting under the ordinance of August 26, 1922, took the general average line of all the houses in the block on both sides of the street. At the time the permit was granted, the amended ordinance of July 11, 1924, which is controlling in this case, [fol. 69] was in effect, which provides that the word "block," as used in the ordinance, should be construed to be that portion on the same side of the street upon which the new building is proposed, bounded by the nearest intersecting street to the right and left of the said proposed building.

There are only five buildings on the same side of the street between the intersecting streets. Three of them are located 44.2 feet, the fourth one 44.3 feet, and the fifth one 37.5 feet from the street line. Treating the difference of one tenth of a foot as de minimis, and considering the fourth building as located only 44.2 feet from the street, the existing house line upon which sixty per cent of the houses in the "block" are located would be 44.2 feet from the street, and under section 244 of the ordinance the Gorich building would have to be located 44.2 feet from the street line. If the council erred in permitting him to build 34$\frac{2}{3}$ feet from the street, it was an error in his favor of which he cannot complain.

For the foregoing reasons, we are of opinion that the ordinance under consideration is constitutional and valid in all respects, and that there is no reversible error in the judgment complained of.

Writ of mandamus denied.

A copy. Teste: H. H. Wayt, Clerk.

[fol. 70] In Supreme Court of Appeals of Virginia

[Title omitted]

Concurring Opinion

Campbell and Chichester, JJ., concurring:

We concur in the result, but we do not concur in the view that that part of the ordinance which confers upon the city council of the city of Roanoke the power to grant, in their discretion, special permission to individuals to build on a line other than the existing house line, is valid.

A copy. Teste: H. H. Wayt, Clerk.

[fol. 71] Clerk's certificate to foregoing transcript omitted in printing.

Judge's certificate to clerk omitted in printing.

[fol. 72] Clerk's certificate to judge omitted in printing.

[fol. 73] Supreme Court of the United States

Order Allowing Certiorari—Filed February 21, 1927

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

February 21, 1927.

IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1926

No. 739

STIPULATION AND ADDITION TO RECORD—Filed April 18, 1927

It is hereby agreed by and between the parties to the above-entitled proceeding, by their respective counsel of record, that the certified copy of the Ordinance by J. M. Kelly, Clerk of the Supreme Court of Appeals at Wytheville, Virginia, referred to on page 21 of the record dividing the City of Roanoke into Districts, etc., No. 1020, and passed by the Council of the City of Roanoke on the 19th day of January, 1923, shall be taken and considered as a part of the record of the case to be heard and determined by this court.

And it is further understood and agreed by and between counsel of record for both parties in the above proceeding that this case be submitted on printed briefs, regardless of its place on the docket.

Robt. C. Jackson, Counsel for Charles D. Fox et als., Members of the City Counsel of Roanoke, Virginia.
G. A. Wingfield, Counsel for S. M. Gorieb.

IN THE COUNCIL FOR THE CITY OF ROANOKE, VIRGINIA, THE 19TH DAY OF JANUARY, 1923

No. 1050

An ordinance to divide the City of Roanoke into districts for the purpose of regulating the use of land and of buildings and other structures and the height thereof, and to establish building lines and to regulate and restrict the construction and location of buildings and other structures.

Whereas, it is necessary for the protection of health, safety, morals, comfort, prosperity and general welfare of the general public of the City of Roanoke, that the City be divided into two districts, one of which districts to be known as the "Business District" and the other as the "Residential District."

Therefore, be it ordained by the Council of the City of Roanoke that that portion of the City of Roanoke within the following boundaries, to-wit:

Jefferson Street from Gilmer Avenue N. W., to the Roanoke River, S. W.; Gainsboro Road from Gilmer Avenue, N. W., to Harrison Avenue N. W.; First Street from Gilmer Avenue N. W., to Franklin Road S. W.; Second Street from Loudon Avenue N. W., to Franklin Road S. W.; Third Street from Loudon Avenue N. W., to Franklin Road S. W.; Fourth Street from Loudon Avenue N. W., to Campbell Avenue S. W.; Fifth Street from Loudon Avenue N. W., to Campbell Avenue S. W.; Sixth Street from Shenandoah Avenue N. W., to Campbell Avenue S. W.; Seventh Street from Shenandoah Avenue N. W., to Norfolk Avenue S. W.; Eight Street from Shenandoah Avenue N. W., to Norfolk Avenue S. W.; Ninth Street from Shenandoah Avenue N. W., to Norfolk Avenue S. W.; Tenth Street from Shenandoah Avenue N. W. to Norfolk Avenue S. W.; First Street from Norfolk Avenue S. E. to Elm Avenue S. E.; Second Street from Gilmer Avenue N. W. to Tazewell Avenue S. E.; Third Street from Norfolk Avenue S. E. to Walnut Avenue S. E. 3½ Street from Mountain Avenue S. E. to Albemarle Avenue S. E.; Fourth Street from Mountain Avenue S. E. to 3½ Street S. E.; Fourth Street from Rutherford Avenue N. E. to Lynchburg Avenue N. E.; Seventh Street from Patton Avenue N. E. to Lynchburg Avenue N. E.; 9th Street from Norfolk Avenue S. E. to Lynchburg Avenue N. E.; 13th Street from Wise Avenue to Norfolk Avenue S. E.; 14th Street from Wise Avenue to Norfolk Avenue S. E.; Lynchburg Avenue from 7th Street to 9th Street N. E.; Commonwealth Avenue from Shenandoah Avenue to Rutherford Avenue N. E.; Gilmer Avenue from 1st Street N. W. to Jefferson Street; Wells Avenue from 1st Street N. W. to Second Street N. E.; Loudon Avenue from 5th Street N. W. to 1st Street N. W.; Center Avenue from 5th Street N. W. to Jefferson Street; Shenandoah Avenue from 10th Street N. W. to Patton Avenue N. E., Jackson Avenue from 6th Street S. W. to 10th Street S. W.; Norfolk Avenue from 17th Street S. E. to 10th Street S. W.; Salem Avenue from Second Street S. E. to 6th Street S. W.; Rorer Avenue from 4th Street S. W. to 6th Street S. W.; Wise Avenue from 14th Street S. E. to 12th Street S. E.,

Campbell Avenue from Norfolk Avenue S. E. to 6th Street S. W.; Kirk Avenue from 2nd Street S. E. to 2nd Street S. W.; Church Avenue from 2nd Street S. E. to 3rd Street S. W.; Luck Avenue from 1st Street S. E. to 5th Street S. W.; Tazewell Avenue from 3½ Street S. E. to Jefferson Street; Franklin Road from Jefferson Street to alley between Elm and Mountain Avenue, S. W. and from Pleasant Avenue to McClanahan Place, South Roanoke; Bullitt Avenue from 3rd Street S. E. to Jefferson Street; Mountain Avenue from 4th Street S. E. to 3rd Street S. E.; Albemarle Avenue from Jefferson Street to 4th Street S. E.; Walnut Avenue from Jefferson Street to Roanoke River; Pleasant Avenue from Jefferson Street to Franklin Road S. W., be, and the same is hereby designated as the "Business District" and all the rest of the City of Roanoke be, and the same is hereby designated as the "Residential District."

Attest: [Signature illegible], City Clerk.

Clerk's certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

DEC 28 1926
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 799

S. M. GORIEB, PETITIONER,

vs.

CHARLES D. FOX ET AL., MEMBERS OF THE CITY COUNCIL OF ROANOKE, VIRGINIA.

PETITION FOR WRIT OF CERTIORARI.

W. V. BIRCHFIELD, JR.,
G. A. WINGFIELD,
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 799

S. M. GORIEB

vs.

CHARLES D. FOX ET ALS., MEMBERS OF CITY COUNCIL OF ROANOKE, VIRGINIA, ET ALS.

The Petition of S. M. Gorieb for Review on Writ of Certiorari of a Decision of the Supreme Court of Appeals of Virginia, a State Court of Last Resort.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, S. M. Gorieb, respectfully represents that on the 29th day of September, 1926, a final judgment was entered by the Supreme Court of Appeals of Virginia (R., 53), affirming a judgment entered by the Circuit Court of Roanoke City, Virginia, on the 2d day of March, 1925 (R., 25), denying a writ of mandamus wherein petitioner was plaintiff and the City of Roanoke, Virginia; Charles D. Fox, W. M. Shickel, B. J. Fishburne, J. B. Comer, Luther G. Stiff, mem-

Roanoke, Virginia, to deprive the petitioner of the use of his property without compensation, which your petitioner contends is "a taking" of private property by the City of Roanoke, Virginia, without providing any compensation therefor, and is in violation of both the Federal and State Constitutions.

The court erred in holding that the City Council had the right to grant or withhold a building permit to like persons under like circumstances and conditions. Two of the Honorable Judges of the Supreme Court of Virginia refused to concur in that part of the ordinance which confers upon the City Council of the City of Roanoke, Virginia, the power to grant, in their discretion, special permission to individuals to build on a line other than the existing house line, but concurred in denying the writ of mandamus (R., 63). It is submitted that under the former decisions of this Court police regulations are invalid where they do not apply to all persons under like circumstances and conditions. This was assignment of error No. 1 in the court below (R., 4).

The court erred in construing the ordinance to prohibit the building by the petitioner closer to the street than 34½ feet. This assignment of error was made in the trial below (R., 4).

Section 244 of the ordinance establishes the building line as a line upon which 60 per cent of the houses in the block already erected have the relation to the street (R., 13). There is no uniformity in the front line of the existing houses, and the act not specifying whether to take 60 per cent of the houses nearer to the street or 60 per cent of the furthest

houses from the street, the court took the general average and was not guided by the 60 per cent provision of the ordinance (R., 19).

Reasons Relied on for the Allowance of the Writ.

(*a*) The State court has decided a constitutional question in direct opposition to the holdings of this Court. Beginning in 1886 with the case of Yick Wo *vs.* Hopkins, 118 U. S., 356, this Court held an ordinance prohibiting a laundry except in buildings of brick and stone, without the consent of the board of supervisors, unconstitutional, as a naked and arbitrary power, for not applying to all persons in like circumstances and conditions. In the case under consideration the Virginia Supreme Court holds unobjectionable Section 243 of the City Ordinance,

> "That all buildings hereafter to be erected in the City of Roanoke must be built to correspond to the existing house line of the houses built in the same block unless special permission, otherwise granted by the City Council (R., 13)."

In upholding the validity of the above ordinance, the Virginia court has undertaken to overrule the doctrine established in the case of Yick Wo *vs.* Hopkins.

(*b*) The court has decided that the city can deprive the owner of the use of his property for business purposes where the record shows no necessity for a police regulation of this character, no benefit to the public and no convenience or general welfare to the general public by the regulation. This is in violation of both the Federal and State Constitutions and constitutes "a taking" of private property without compensation.

(c) Under Section 244 of the City Ordinance (R., 13), the building line established must be fixed by the average line established by 60 per cent of the buildings in the block. No buildings in the block being a uniform distance from the street, the court disregarded the 60 per cent provision and took a general average, which is in direct conflict with the holding of this Court in the case of Eubank vs. City of Richmond, 226 U. S., 137, quoting from the opinion of Mr. Justice McKenna:

> "It is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed."

If the 60 per cent provision of the ordinance is used, the building line must be determined by either 60 per cent of the nearest houses to the street, 60 per cent of the furthest houses from the street, 60 per cent of the houses at random, or 60 per cent of the nearest and the furthest houses from the street; each calculation gives a different result, and the public convenience, health and safety could not be promoted by a line which may be so variously disposed.

Authorities Cited.

Police regulations, in order to be enforceable, must permit to all persons under like circumstances the enjoyment of the same rights and privileges.

Missouri v. Lewis, 101 U. S., 22;

Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S., 26; 9 Sup. Ct. Rep., 207;

Barbier *v.* Connolly, 113 U. S., 30; 5 Sup. Ct. Rep., 357;

Mallinckrodt Chemical Works *v.* Missouri, 238 U. S., 41-55; 35 Sup. Ct. Rep., 671;

State *v.* Pennoyer, 5 L. R. A., 711, and cases;

Ann. Cas. 1915B, 957;

Yick Wo *v.* Hopkins, 118 U. S., 356;

Village of South Orange *v.* Heller, 1921 N. J., 113 Atl., 697.

A statute or ordinance purports to serve the public good, public health and safety, but which in effect does not so serve, but constitutes the taking of private property for public use without providing compensation therefor, is unconstitutional.

John R. Spann *v.* City of Dallas, Texas, 19 A. L. R., page 1387; and recent cases annotated, page 1395; 4 R. C. L., 397;

St. Louis *v.* Hill, 21 L. R. A., page 226;

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Eubank *v.* City of Richmond (U. S.), 42 L. R. A., 1123;

Robert Wilson *v.* Demmie P. Cooke, Colorado, 1913, 44 L. R. A. (N. S.), page 1031;

Levy *et als. v.* Mrovlog, Supreme Court N. J., 1921, 115 Atl., 350 (footnote 42 L. R. A. (N. S.), 1125);

State of Ill. *v.* City of Chicago, 49 L. R. A. (N. S.), 441 (see annotation);

Chas. H. Buchanan *v.* William Worley, 38 U. S. Supreme Court Reports, 16 (see annotation).

The petitioner avers that in the aforesaid judgment (R., 53) certain errors were committed to the prejudice of the petitioner; the guarantee granted in Article 14, Section 1, of the Constitution of the United States was violated in that the petitioner is deprived of his property without process of law and is denied equal protection under the law.

The said judgment and proceedings show a violation of the guarantee and the Constitution of Virginia, Section 11, that no persons shall be deprived of his property without due process of law.

Whereof your petitioner prays that a writ of certiorari from the Supreme Court of the United States may issue in this case to the Supreme Court of Appeals of Virginia, for the correction of the errors complained of and shown upon the face of the record herewith presented, that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the clerk of the Supreme Court of Virginia, may be sent to the Supreme Court of the United States as provided by law.

Dated at Roanoke, Virginia, the 17th day of December, 1926.

S. M. GORER,
By W. V. BIBBIFIELD, Jr.,
G. A. WINGFIELD,
His Attorneys.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 799

S. M. GORIEB, Plaintiff,

versus

CHARLES D. FOX, et als., Defendants.

REPLY BRIEF OF COUNSEL FOR THE PLAINTIFF.

Statement of Facts:

The facts in this controversy have already been stated in petition for writ of certiorari on Pages 2, 3, and 4 of said petition, however, for the convenience of the court a short statement of the facts will be given.

The petitioner is the owner of several lots, in the City of Roanoke Virginia, lying in about the center of the City, on an improved street, in a semi-business district, with stores in the block

above and stores and garages in the block below, a house used for a residence is on a portion of said property, but the Western portion of said property, a corner lot has not been improved and there is no building thereon. (R. 23 to 35 inclusive.)

The record shows that the unimproved property is undesirable for residential purposes and has a value of about $3,000.00, but for business property is worth about $10,000.00 (R. 24, 26.)

The City of Roanoke Virginia by a city ordinance has prohibited the petitioner from the use of that part of the property lying along the street for building purposes, and the city council has refused to grant a building permit for the erection of a building nearer to the street than 34.2 feet. (R., 13) The property has little or no value as business property with the building erected 34.2 feet from the street. (R., 25, 26, 27, 36.)

Argument:

In the brief of Counsel for the defendents it is set out that the rule in the case of Yick Wo vs Hopkins, 118 US, 356 should not apply to the case now before the court. It is claimed that the City Council has no discretion as to whether a street line shall or shall not be established in a given case, but by the terms of the ordinance the council is permitted in its discretion to permit a building to be erected closer to the street

than the established line. In other words the council is authorized and empowered to give to one person and withhold from another person the right to improve his property under like circumstances and conditions. The language of the ordinance of Roanoke City and the ordinance in the case of Yick Wo vs Hopkins is the same, in both cases persons are prohibited from the use of property, unless special permission is granted from the governing power. In the case of Yick Wo vs Hopkins the fire danger of conducting a laundry in wooden buildings, may have been controlled under the Police Power, but in this case the ordinance of the City of Roanoke is so loosely drawn that no real standare of placing the houses in the street is established. In one block the building line may be in one place and in another block in a different place and every block in the City may be different as to the building line. The ordinance is unreasonable on its face and has no relation to the public health, morals, safety or welfare, but is a Zoning Ordinance enacted under the pressure of the advocates of the so-called "City Beautiful" and at one stride reduces the market value of the petitioners property from $10,000.00 to $4,000.00 (R., 26). The act does not provide for any notice to the owners of property but establishes a line based upon the distance from the street that 60 per cent of the houses have already fixed without giving any rule to guide in the selection of the 60 per cent of the houses

and said line is governed solely by the whims of the City Council to allow a building any distance from the street in one case and to refuse in another under like circumstances and conditions. Never yet has it been held in this country that the right to use and enjoy real property can be controlled by the whims of a City Council or the governing body of town or City.

In large cities some questions of this kind may arise, but in country towns and small cities the modern tendencies of the court to allow the governing bodies unlimited power is unnecessary unjust and very dangerous.

The City does not contend that the ordinance in this case should be upheld as a police regulation for health, morals, safety or welfare, but quotes from the opinion of he court in the Connecticut case of Windsor vs Whitney, 111 Atl 354, 12 ALR 669, the good that might be found in upholding the ordinances in cases not like the case now before the court. In the case of Windsor vs Whitney the property was undeveloped property without streets and without houses while the property of the petitioner is about the oldest property in the City, was residential property twenty years ago and is now semi-business property located in the center of the City, valuable for business property, but of little or no value for a residence. (R., 24 to 35 inclusive).

It is respectively submitted that a line which may be so variously disposed can have no rela-

tion to any of the police powers where the petitioners property is located in a semi-business district with stores in all of the adjacent Blocks, where the Petitioner also owns the adjacent property and is ready, willing and able to build a business building unobjectionable in all particulars erected far enough from every residence to be unobjectionable and it is manifestly unfair that the petitioner be obliged to sell or dispose of his property for which he paid $7,000.00 for $2,000.00 or $3,000.00 because he is denied the right to the use of 34 feet on the front thereof and that the purchaser being influential with the governing body may obtain a building permit for a business building and realize $10,000.00 for the same property immediately. (R., 24-35 incl.) It is also manifestly unfair to the city as well as to the owners of property to tie up the use of real property and prohibit the building of business houses in locations that are semi-business locations as the record in this case shows the petitioners property to be. In this case three of the oldest real estate agents of the City of Roanoke took the stand and testified that the petitioners property was worth about $3,000.00 for residence property and worth about $10,000.00 for business property, that the City in restricting the use of 34.2 feet of the front made the property practically worthless for business property, (R., 24, 35 inclusive) that the only property that could be damaged or injured by the erection of a business building would be

the adjacent property which is owned by the petitioner, (R., 27.)

The many authorities dealing with Zoning Ordinances have recently been cited so many times that it is unnecessary to cite cases in addition to the cases set out in the petitioners opening brief and it is sufficient to say that the Court of Appeals of Virginia, in its opinion, (R., 51-60 incl.) is lead to the conclusion that the Ordinance is constitutional chiefly on account of the Virginia cases that have been heretofore decided by the Virginia Court and the cases cited by the Court in its opinion are cases that are not in point with the case decided and in most instances the cases are not even similar.

Respectfully submitted,

S. M. GORIEB.

By G. A. WINGFIELD,
W. V. BIRCHFIELD, Jr,
His Attorneys.

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WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1926

No. 799

S. M. GORIEB, *Plaintiff*

VERSUS

CHARLES D. FOX, ET ALS., *Defendants*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF OF COUNSEL FOR DEFENDANTS

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The facts and circumstances out of which this case arose have been stated fully and in detail in the Opinion of the Court of Appeals of Virginia delivered by Judge Jesse F. West and made a part of the record in this Court on pages 54 to 63, both inclusive.

Petitioner makes three contentions for the reversal

of the State court's affirmance of the order of the Court of Law and Chancery of the City of Roanoke dismissing the Petition for Mandamus filed in said court as follows:

(a) THAT SECTION 243 OF THE CITY ORDINANCE INVESTS THE COUNCIL OF THE CITY OF ROANOKE WITH A DISCRETION WHICH IS PURELY ARBITRARY AND FOR THAT REASON IS UNCONSTITUTIONAL.

(b) THE CITY ORDINANCE CONSTITUTES THE TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION AND VIOLATES BOTH THE CONSTITUTION OF THE COMMONWEALTH OF VIRGINIA AND THE FEDERAL CONSTITUTION.

(c) THAT SECTION 244 OF THE ORDINANCE IS VOID FOR UNCERTAINTY AND CANNOT BE REASONABLY CONSTRUED AS INCLUDING PLAINTIFF'S PROPERTY.

We will very briefly discuss these contentions and assignments in the order in which they are above stated.

I

(a) THAT SECTION 243 OF THE ORDINANCE INVESTS THE COUNCIL OF THE CITY WITH POWERS PURELY ARBITRARY IN THE MATTER OF GRANTING OR REFUSING PERMITS TO ERECT BUILDINGS NEARER THE STREET THAN THE ESTABLISHED BUILDING LINE.

Section 244 fixes what shall be the building or "setback" line, but section 243 provides that "all buildings hereafter to be erected in the City of Roanoke must be built to correspond to the existing house-line of the houses built in the same block, unless special permission otherwise granted by the City Council."

The State of Virginia by the General Enabling Statute referred to in the record plainly undertook to confer upon the City of Roanoke and other cities of the state authority to enact an ordinance of the kind with which we are concerned. There is no question, therefore, concerning the existence of a delegated authority from the state. The ordinance commits the power to grant building permits to meet the situation mentioned in the ordinance to the discretion of the very body which passed the ordinance and to which the legislature has directly delegated the police power of the state, as well as the power to pass such ordinances as were in their judgment necessary for the protection, health, peace, safety and welfare of the inhabitants of their respective cities.

It has often been held that more or less arbitrary discretion may be vested in officers of state or city without rendering the statute or ordinance void on that account. It would hardly be feasible to specify in an ordinance all the conditions which would justify the council in granting or refusing a permit to build closer to the street than the established street line in the interest of the public health, safety and general welfare.

This must necessarily be left to the judgment and discretion of the Council or to some one else, as applied to the particular lot or place. Of course, if a council or other officer, be shown to be guilty of persistently exercising the authority conferred on them in an arbitrary or oppressive manner the Courts might, and doubtless would, hold the ordinance vesting them with such authority to be unreasonable and unconstitutional.

Such a case was presented by the facts in the case of Yick Wo, vs. Hopkins, 118 U. S., 356, so confidently relied on by Counsel for Petitioner.

No such contention, however, is made here. The Council is clothed with no discretion as to whether a street line shall or shall not be established in a given case, but by the terms of the ordinance the council is permitted in its discretion and in order to relieve the hardship in any particular case to permit a building to be erected closer to the street than the established line. The exercise of such functions arising out of the police power has often been exercised and often delegated by City Council to other officers of the city and held to be lawful and proper. The decisions recognizing the validity of such ordinances are cited and discussed in

the Opinion of the Supreme Court of Virginia and need not be further referred to or discussed here.

II

(a) THE CITY ORDINANCE CONSTITUTES THE TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION AND VIOLATES BOTH THE CONSTITUTION OF THE COMMONWEALTH OF VIRGINIA AND THE FEDERAL CONSTITUTION.

In approaching this question, it is to be borne in mind that every presumption and intendment must be exercised in favor of the constitutionality of the legislation and the ordinance in question. This rule has been so often stated by the Courts, both State and Federal, that it is unnecessary to cite decisions in support thereof.

The right to acquire, possess and protect property is secured to every one under the Constitution of Virginia and under the Constitution of the United States. Tremendously important as this right to own and to enjoy property is, it is not absolute and unqualified, and is subject to the exercise of what is known as the police power inherent in government. It has often been said, too, that every exercise of the police power relating to the use of land is likely to affect adversely the property rights of some individual. But the fact that the exercise of this power may operate to restrict

the individual citizen in the use of his own property or the conduct of his own business is not sufficient to render reasonable regulations in regard thereto invalid.

Barbier vs. Connoly, 113 U. S., 27;
Booth vs. Illinois, 184 U. S., 425;
Hadacheck vs. Sebastian, 239 U. S., 394;
California Reduction Co. vs. Sanitary Reduction Works, 199 U. S., 306.

It is well known that until a few years ago a haphazard building development prevailed throughout American Cities. Municipalities exercised little or no control over the use of private real estate. Constitutional guarantees and safeguards of private property rights were construed literally. The power known as the "Police Power" of the government, was little understood and rarely invoked to modify the literal and precise guarantees afforded by constitutional provisions to the individual citizen and to prevent him from obstructing the state and the city in the pursuit of such salutary measures of control as are reasonably calculated to protect society in its peace, health, safety, morals and general welfare.

About 1916, however, the method of control and direction of city growth by municipal regulations called "Zoning" was devised and "set-back" lines generally provided.

Prior to that time, the owner of property could use it for any purpose he pleased and in any way he pleased, provided he did not establish and maintain what it is known as a "common law nuisance." The result was chaotic. For want of some sort of well con-

sidered plan of building, each man built with reference to his individual interest only, and in many instances without any reference whatever to his neighbor. Since that time it is well known that such regulations as are provided by the statute and ordinance in question have spread with great rapidity throughout the country.

That there are numerous advantages to be derived from the establishment of set-back building lines, and that the health, comfort convenience and general welfare of the people of a city are promoted thereby would seem to be most obvious. Without some such regulations there is no such thing as orderliness in the building of a city, and it is familiar knowledge that haphazard growth is inefficient, wasteful and unsightly. Front yards afford room for lawns and trees; keep the dwellings farther from the dust, noise and fumes from the streets; add to the attractiveness and comfort of residence sections; create a better home environment, and, providing a greater distance between the houses on opposite sides of the street, tend to reduce the fire hazard. Moreover, the projection of a building beyond the front line of adjacent dwellings cuts off light and air.

The congestion incident to the rapid growth of automobile traffic in recent years has brought the representatives of cities face to face with the cost of condemning buildings in order to widen the streets, and the safety of the traveling public is clearly conserved by removing all dangers incident to hidden corners caused by erecting buildings such as the one proposed

by Gorieb, on the street line at a street intersection corner.

If we look to the decisions of the different courts which have dealt with the question of building, or setback lines, it may be conceded that the contentions of the Petitioner as to the regulations here involved, find support in some of the decisions in some of the states on the ground that such regulations constitute a taking of private property for public use without compensation, and, are therefore unconstitutional.

> Williamson vs. Cook (Colo.) 44 LRA (N.S.) 1030;
> St. Louis vs. Hill (Mo.) 31 LRA, 226; 22 S. W., 861;
> Val Fruth vs. Board of Affairs (W. Va.), 84 S. E., 105;
> Eaton vs. S. Orange (N. J.), 130 Atl., 362.

* * * * * * * * *

A few years ago the weight of authority favored the position that the establishment of building lines under the police power is a taking of private property without just compensation and unconstitutional; but within the last few years the trend of reason and authority indicates an increasing disposition in favor of establishing building lines without compensation.

> Windsor vs. Whitney (Conn.), 111 Atl., 354; 12 A. L. R., 669;
> Lasalle vs. Ferguson (Tex.) 202 S. W., 317;
> Eubank vs. City of Richmond, 110 Va., 749;
> Pritz vs. Messer (Ohio), 149 N. E., 30;

Wulfshon vs. Burden, 241 N. Y., 288; 43 A. L. R., 651.

The case of Windsor vs. Whitney, supra, is an illuminating and convincing discussion of the subject. Speaking of the numerous advantages of set-back lines the Connecticutt Court in that case said:

"Adequate space for light and air will be given. Such a plan is a wise provision for the future. It betters the health and safety of the community; it betters the transportation facilities; it adds to the appearance and the wholesomeness of the place, and as a consequence, it reacts upon the morals and spiritual power of the people who live under such surroundings. The demands of a large city may excuse congestion, but in a small city or country town, there is no use for such living conditions; but unless some authority regulates and controls the land development, we may look for too narrow streets, too few or no building lines, and buildings erected unstable in character, unsuitable in material and inappropriate in construction. All our large communities have their examples of the unregulated layout of streets and buildings, of instances of land development so as to yield the last penny to its promoters, regardless of the public welfare; of community eye-sores; of streets made over; whose sections changed because of the beginning, no reasonable provision was made for the safety, health or welfare of the community. Such an act as this is conceived in public wisdom and serves great public needs. Courts will be reluctant to destroy

it, and with its beneficent purposes. We should not do this unless we were clearly satisfied that the act was against our fundamental law, or was so unreasonable as to be beyond the range of the police power."

Again on page 674 the court deals with the question in this way:

"If a building line six feet from an owner's street line will tend to preserve the public health, add to the public safety from fire, and enhance the public welfare by bettering living conditions and increasing the general prosperity of the neighborhood, can it be done by legislative authority in the exercise of the police power, where such an exercise of the police power is reasonable under the circumstances of the case? We hold that it can, and that this is not a taking of property in violation of the constitutional right, for which compensation must be made. The body of the law upon the subject of the police power is the growth of comparatively recent years. It has been said to be still in the formative stage.

"The line between eminent domain and the police power is a hard one to hold with constancy and consistency, and it is not surprising that now and again these two great powers of government have been confused. A few years ago it was, so far as the rule had been announced, undoubted that restrictions could not be imposed upon a private property solely for aesthetic considerations. Later it has been said by high authority that aesthetic considerations may be regarded in con-

nection with recognized police power considerations. And now Dillon in the latest edition of his "Municipal Corporations," Sec. 695, says: "The law on this point is undergoing development, and perhaps cannot be said to be conclusively settled as to the extent of the police power."

Welch vs. Swasey, 214 U. S., 91; 53 L. Ed., 923; 29 Sup. Ct. Rep. 567, affirming 193 Mass. 364; 23 L. R. A. (N.S.) 1160; 118 AM. St. Rep., 523; 79 N. E. 745, tends to justify the author's conclusion.

Where the free exercise of one's rights of property is detrimental to the public interest, the state has the right to regulate reasonably such exercise of control under the police power. And that, of course, means without compensation."

* * * * * * * * *

A closely kindred question arises in connection with the numerous ordinances enacted in many states and cities relative to what is known as zoning. It is obvious that a restriction against building at all on a given lot is a serious invasion of property rights. A consideration, therefore, of the cases in various jurisdictions sustaining the constitutionality of zoning ordinances proper is important as throwing light on the attitude of the courts regarding the subject of set back lines. While there is conflict of opinion, the decided weight of authority upholds the validity of zoning ordinances as a proper exercise of the police power.

Village of Euclid vs. Ambler Realty Co., Advance Opinions of United States Supreme Court No. 4, December 15th, 1926, page 171.

It ordinances which provide that certain buildings lawful in their use, such as garages, gasoline filling stations, etc., may not be erected in residence sections, are sustained as a valid exercise of the police power, similar, if not the same, reasons would seem to dictate that set back building lines should be sustained.

In Windsor vs. Whitney, supra, the Connecticutt Court says:

> "The regulation of the location and width of streets and the establishment of building lines, is by no means as much of an impairment of the right to use property as are the provisions of our statutes regulating tenements and lodging houses. These limit the area of the lot which the tenement house shall occupy. They provide for rear yards. They regulate the air space, light and ventilation of rooms, and in many other ways the state restricts the use of such property by an owner."

Patterson Avenue is one of the few beautiful streets in Roanoke City. The section in which the plaintiff proposes to erect a storehouse is essentially a residence section. The people who live along the street have built neat residences well set back from the street. They have given this property value along the street as a residence street. The Petitioner has contributed nothing whatever to the section, but proposes to come

in and take advantage of the section, and to make a use of his property, if permitted, that would do great injury to other property in the block, and in that section. As we have seen, every citizen holds his property subject to the exercise of the police power. The exercise of this power for the public welfare may inconvenience individuals, increase their labors, and decrease the value of their property, but will not, on that account, be held unconstitutional.

The value to any given property holder of protecting himself against possible injury through the construction on neighboring property of a building set directly up to the line of the sidewalk, is of more consequence than the theoretical loss to himself of the privilege of building up to his own line. It is stated that in actual practice the advantages and disadvantages are about equal.

For the arguments and reasons above advanced, it is earnestly insisted that the ordinance and the provisions of the ordinance in question, tend to promote the health, safety, comfort, prosperity and general welfare of the inhabitants of the City of Roanoke, or one or more of these purposes, and that neither the city ordinance nor any of its provisions deprive the plaintiff of the lawful use of his property, without due process of law, but, on the contrary, are a valid and legitimate exercise of the police power expressly granted by the Legislature of Virginia to the City of Roanoke.

III

(c) THAT SECTION 244 OF THE ORDINANCE IS VOID FOR UNCERTAINTY AND CANNOT BE REASONABLY CONSTRUED AS INCLUDING PLAINTIFF'S PROPERTY.

Under this assignment, it is contended that the ordinance was drawn to meet a condition where sixty per cent of the houses in a block on both sides of the street are uniform, and that here they are not uniform.

SECTION 244 of the Ordinance, page 25 of the record provides:

> "That the line of the existing houses shall be the line upon which sixty per cent of the houses in the block in which the proposed building is intended to be erected, have with relation to the street, and the said proposed buildings must be at least as far from the street as the line established by said sixty per cent of the houses."

The section further provides:

> "The word "block" herein used does not refer to any entire city square, but shall be construed to be that portion on the same side of the street upon which the new building is proposed, bounded by the nearest intersecting streets to the right and left of the said proposed building."
>
> * * * * * * * * *

By an inspection of Exhibit and Map filed by E. B. Jacobs and Company, pp. 18 and 19 of the record, it will be seen that there are five houses on the side of the

street on which Gorieb proposed to erect his building and eight on the other side, and that the five houses on the same side of the street, and within the same block as the Gorieb proposed building are as follows:

No. 1001 Patterson Avenue.....37.5 feet
No. 1005 Patterson Avenue.....44.2 feet
No. 1009 Patterson Avenue.....44.2 feet
No. 1027 Patterson Avenue.....44.3 feet
No. 1023 Patterson Avenue.....49.2 feet

Two of the lots are a uniform distance of 44.2 feet and a third lot is 44.3 feet, making only a difference of one-tenth of a foot between the lots. This difference falls within the doctrine of de minimis, and so construed, gives sixty per cent uniformity on the one side as required by amended ordinance. In the construction of an ordinance all of its provisions should be given effect to, if possible. And it is submitted that there is no such uncertainty in the language as to justify the conclusion that the ordinance in question cannot be enforced. While the line established by sixty per cent of the houses would be 44.2 feet from the street, and under section 244 of the Ordinance the Gorieb building would have to be located 44.2 feet from the street line, as pointed out by the Virginia Court, if the Council erred in permitting him to build 34.2 feet from the street, it was error in his favor, of which he cannot complain.

Respectfully submitted,

CHAS. D. FOX, *et als.*

By Robt. C. Jackson, City Solicitor.

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SUPREME COURT OF THE UNITED STATES.

No. 799.—October Term, 1926.

S. M. Gorieb, Petitioner,
vs.
Charles D. Fox, et al., Members of the City Council of Roanoke, Virginia, et al.

On Writ of Certiorari to the Supreme Court of Appeals of the State of Virginia.

[May 31, 1927.]

Mr. Justice Sutherland delivered the opinion of the Court.

For the declared purpose of establishing building lines and regulating and restricting the construction and location of buildings, and for other purposes, an ordinance of Roanoke, Virginia, divides the city into "business" and "residential" districts. Another ordinance, as amended July 11, 1924, creates a set-back or building line, with relation to the street, to which all buildings subsequently erected must conform. The line must be at least as far from the street as that occupied by sixty per cent. of the existing houses in the block, the word "block" being defined to mean only that portion on the same side of the street where the new building is proposed, bounded by the nearest intersecting streets to the right and left thereof. The city council by a proviso reserved to itself the authority to make exceptions and permit the erection of buildings closer to the street.

Petitioner owns several building lots within the residential district upon one of which he has a dwelling house. He applied to the city council for a permit to erect a brick store building upon an adjoining lot, and, after investigation, the council by resolution gave him permission to erect a brick store thirty-four and two-thirds feet back from the street line. He thereupon sought by mandamus to compel the council to issue a permit to occupy the lot for his building up to the street line, alleging the unconstitutionality of the set-back ordinance. The judgment of the court of first instance was against him, sustaining the validity of the ordinance and the action of the council. This judgment was affirmed by the state supreme court, 145 Va. 554, which held that the ordinance was

valid and within the legislative grant of power. Acts of the Assembly, 1922, p. 46.

The ordinances summarized above were those in effect when the permit was granted by the council, and they alone are involved in this inquiry. The attack here is upon the set-back ordinance, and that is assailed as contravening the due process of law and equal protection clauses of the Fourteenth Amendment to the federal Constitution.

It is said, first, that the standard furnished is so vague and uncertain as in reality to be no standard at all, since the houses, or sixty per cent. of them, in any block may stand at a variety of distances from the street, in which event it cannot be determined from the ordinance whether sixty per cent. of the houses nearest to the street or sixty per cent. of those farthest from the street or some other method of calculation is to govern. But in the present case this contention may be put aside, since (a) the permit was granted and the building line fixed under the proviso which reserved to the council in appropriate cases authority to fix the building line without reference to this limitation, and (b) as to the existing houses in the block in question, the actual differences in respect of the building lines upon which more than sixty per cent. of them stood are so slight as to be entirely negligible upon the question of certainty.

The evidence shows that the variation in the location of eighty per cent. of the existing houses was only one-tenth of a foot and, ignoring this inconsequential difference, the established building line was slightly over forty-two feet back from the street. The line designated for petitioner's building was substantially more favorable to him than this, being more than seven feet nearer the street. Whether the provision of the ordinance, fixing the line with relation to the location of sixty per cent. of the existing houses, in its general, or in some other specific, application is so vague as to amount to a denial of due process, is a question which does not concern petitioner, since, as applied to the facts in the present case, it is definite enough, and since, in any event, he has been excepted from the operation of the provision, and it does not appear that the alleged unconstitutional feature of which he complains has injured him or operated to deprive him of any right under the federal Constitution. *Oliver Iron Co. v. Lord*, 262 U. S. 172, 180-181; *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 42.

Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282, 289; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544-545.

The proviso, under which the council acted, also is attacked as violating the equal protection clause on the ground that such proviso enables the council unfairly to discriminate between lot-owners by fixing unequal distances from the street for the erection of buildings of the same character under like circumstances. We cannot, of course, construe the ordinance as meaning that the power may be thus exerted; nor may we assume in advance that it will be exercised by the council capriciously, arbitrarily, or with inequality. It will be time enough to complain when, if ever, the power shall be thus abused.

The proviso evidently proceeds upon the consideration that an inflexible application of the ordinance may under some circumstances result in unnecessary hardship. In laying down a general rule, such as the one with which we are here concerned, the practical impossibility of anticipating in advance and providing in specific terms for every exceptional case which may arise, is apparent. And yet the inclusion of such cases may well result in great and needless hardship, entirely disproportionate to the good which will result from a literal enforcement of the general rule. Hence the wisdom and necessity here of reserving the authority to determine whether, in specific cases of need, exceptions may be made without subverting the general purposes of the ordinance. We think it entirely plain that the reservation of authority in the present ordinance to deal in a special manner with such exceptional cases is unassailable upon constitutional grounds. *Wilson* v. *Eureka City*, 173 U. S. 32, 36-37; *In re Flaherty*, 105 Cal. 558, 562; *Ex parte Fiske*, 72 Cal. 125, 127.

Yick Wo v. *Hopkins*, 118 U. S. 356, upon which petitioner relies, is not to the contrary. The ordinance there involved vested uncontrolled discretion in the board of supervisors, and this discretion was actually exercised for the express purpose of depriving the petitioner in that case of a privilege that was extended to others. See *Crowley* v. *Christensen*, 137 U. S. 86, 94.

The remaining contention is that the ordinance, by compelling petitioner to set his building back from the street line of his lot, deprives him of his property without due process of law. Upon that question the decisions are divided, as they are in respect of

the validity of zoning regulations generally. But, after full consideration of the conflicting decisions, we recently have held, *Euclid* v. *Ambler Co.*, 272 U. S. 365, that comprehensive zoning laws and ordinances, prescribing, among other things, the height of buildings to be erected (*Welch* v. *Swasey*, 214 U. S. 91) and the extent of the area to be left open for light and air and in aid of fire protection, etc., are, in their general scope, valid under the federal Constitution. It is hard to see any controlling difference between regulations which require the lot-owner to leave open areas at the sides and rear of his house and limit the extent of his use of the space above his lot and a regulation which requires him to set his building a reasonable distance back from the street. Each interferes in the same way, if not to the same extent, with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life. *Euclid* v. *Ambler Co.*, *supra*, p. 386. State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable. *Zahn* v. *Board of Public Works*, — U. S. —, and authorities cited. (Decided May 16, 1927.)

The property here involved forms part of a residential district within which, it is fair to assume, permission to erect business buildings is the exception and not the rule. The members of the city council, as a basis for the ordinance, set forth in their answer that front yards afford room for lawns and trees, keep the dwellings farther from the dust, noise and fumes of the street, add to the attractiveness and comfort of a residential district, create a better home environment, and, by securing a greater distance between houses on opposite sides of the street, reduce the fire hazard; that the projection of a building beyond the front line of the adjacent dwellings cuts off light and air from them, and, by interfering with the view of street corners, constitutes a danger in the operation of automobiles. We cannot deny the existence of these grounds—indeed, they seem obvious. Other grounds, of like

tendency, have been suggested. The highest court of the state, with greater familiarity with the local conditions and facts upon which the ordinance was based than we possess, has sustained its constitutionality; and that decision is entitled to the greatest respect and, in a case of this kind, should be interfered with only if in our judgment it is plainly wrong, *Welch* v. *Swasey, supra*, p. 106, a conclusion which, upon the record before us, it is impossible for us to reach.

The courts, it is true as already suggested, are in disagreement as to the validity of set-back requirements. An examination discloses that one group of decisions holds that such requirements have no rational relation to the public safety, health, morals, or general welfare, and cannot be sustained as a legitimate exercise of the police power. The view of the other group is exactly to the contrary. In the *Euclid* case, upon a review of the decisions, we rejected the basic reasons upon which the decisions in the first group depend and accepted those upon which rests the opposite view of the other group. Nothing we think is to be gained by a similar review in respect of the specific phase of the general question which is presented here. As to that, it is enough to say that, in consonance with the principles announced in the *Euclid* case, and upon what, in the light of present day conditions, seems to be the better reason, we sustain the view put forward by the latter group of decisions, of which the following are representative: *Windsor* v. *Whitney*, 95 Conn. 357; *Matter of Wulfsohn* v. *Burden*, 241 N. Y. 288, 303; *Lincoln Trust Co.* v. *Williams Bldg. Corp.*, 229 N. Y. 313.

Eubank v. *Richmond*, 226 U. S. 137, which is petitioner's main reliance upon this point, presented an altogether different question. The ordinance there considered *required* the committee on streets to fix a building line upon the *request* of the owners of two-thirds of the property abutting on any street. The ordinance was held bad by this court (p. 143) because it left no discretion in the committee. "The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners deter-

mine not only the extent of use but the kind of use which another set of owners may make of their property." And the court expressly declined (p. 144) to consider the power of a city to establish a building line or regulate the structure or height of buildings.

Since upon consideration we are unable to say that the ordinance under review is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," we are bound to sustain it as constitutional. *Euclid* v. *Ambler Co., supra*, p. 395.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.